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# WISCONSIN REPORTS

# 118

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CASES DETERMINED

IN THE

# SUPREME COURT

OF

# WISCONSIN

MAY 8 — SEPTEMBER 8, 1903.

PREPARED AND EDITED FOR THE REPORTER
BY CHARLES F. LAMB
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# JUSTICES

OF THE

# SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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JOHN B. CASSODAY,
*Ex officio* CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
JOSHUA ERIC DODGE,
ROBERT G. SIEBECKER.

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*Attorney General*, - L. M. STURDEVANT,

*Clerk*, - - - CLARENCE KELLOGG.

## ERRORS NOTED IN PREVIOUS VOLUMES.

### VOL. 116.

Page xxii, last line. For 94 W. 640, read 95 W. 640.
" 166, line —6. For *C. F. Bundy*, read *C. T. Bundy*.
" 177, line 13. Same correction.

### VOL. 117.

Page xxiv, line —4. For 79 W. 464, read 76 W. 464.
" 453, line 28. For 79 Wis. 464, read 76 Wis. 464.

# TABLE

OF

# CASES REPORTED.

# TABLE

OF

# CASES CITED BY THE COURT.

# CASES DETERMINED

AT THE

# January Term, 1903.

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## McGarry, Respondent, vs. Runkel and others, Appellants.

*April 21—May 8, 1903.*

(1) *Appeal: Review of findings.* (2–4) *Highways: Conflicting surveys: Statutory width: Presumptions: Evidence: Location of fences.*

1. A finding of fact by the trial court upon conflicting evidence will not be disturbed on appeal, unless so opposed to the clear preponderance of the evidence as to lead to the conviction that the court erred in applying rules of law or failed to give proper consideration to the evidence.
2. Evidence as to the methods followed by different surveyors in locating the lines of a highway, and as to the physical facts confirmatory of one or the other of such surveys, is *held* to sustain the finding of the trial court that the line as run by one of such surveyors corresponded with the original survey.
3. Sec. 5, p. 33, Terr. Laws of 1840, raises a conclusive presumption that a highway laid out thereunder was four rods in width, unless it was otherwise described in the return of the commissioners.
4. The evidence in this case,—showing among other things that the present fences along an old highway are at varying distances between three and four rods apart, the average distance being nearer three rods than four, but that they are nearer together than the ancient fences,—is *held* to disprove, rather than to prove, that the highway, as laid out under the act of 1840, was but three rods wide.

Appeal from a judgment of the circuit court for Kenosha county: E. B. Belden, Circuit Judge. *Modified and affirmed.*

Plaintiff being the owner of a tract of land nine or ten rods in width, bounded northerly on a highway running in a northwesterly and southeasterly direction, in June, 1901, built a fence on what he claimed to be the boundary line between his premises and such highway. That line was adopted in compliance with a survey made by one McKesson, hereinafter called the "McKesson survey," and on the theory that the highway was three rods in width, the fence being about a foot more than one and one-half rods from the center line of said survey. That highway is the same considered in *Randall v. Rovelstad,* 105 Wis. 410, 81 N. W. 819, and plaintiff's premises are next west of those of Rovelstad, considered in that case. The highway was laid out by county commissioners in April, 1840; their report containing no specification of its width, but merely of the line pursued. A survey by one Powrie was also made, and presented upon the trial, which located the center line of the road opposite plaintiff's premises some two rods south of the McKesson. Considerable evidence was given of the method of making both surveys and of the supposed finding of original monuments and other indications of the location of the original traveled highway. Plaintiff's fence was a wire web, extending across the whole width of his premises, parallel to the course of the road, and with fences in extension of the east and west sides thereof. It effectually obstructed the traveled part of the road, which, owing to topography, was crowded southward at this particular point. The town officers, under claim of such obstruction, removed all of the fence back to a point about two rods and a half south of the center line according to McKesson's survey, but not beyond the limits of the highway according to the Powrie survey. The court held the McKesson survey correct, and the highway three rods wide, and, as a result, that all acts of the defendants were upon plaintiff's premises, and that he was thereby damaged $25, for which judgment was rendered, accompanied by a permanent injunction against threatened

repetitions of the same trespass; from which judgment the defendants appeal.

For the appellants there was a brief by *Rietbrock & Rietbrock,* attorneys, and *Joshua Stark,* of counsel, and oral argument by *Mr. Stark* and *Mr. A. C. Rietbrock.*

For the respondent there was a brief by *Murphy & Kroncke,* and oral argument by *George Kroncke.*

DODGE, J. There are but two questions in this case, and they both questions of fact. They are, first, whether the trial court's finding that the McKesson survey was correct is sustained by the evidence; and, secondly, whether the finding that the road in question was laid out a three-rod road is so sustained.

The first question involves a very large amount of conflicting evidence, primarily that of two surveyors as to the relative accuracy with which they measured angles and distances in running the survey, and with reference to the various confirmatory signs discovered upon the ground, consisting of fences, indications of ancient travel, topographical conditions likely to have been considered in selecting the original highway, and specific monuments mentioned in the original survey. Of course, upon such conflict the finding of the court must stand, unless it is so opposed to the great and clear preponderance of the evidence as to lead us to the conviction that the court must have erred in applying rules of law, or through mistake or other reason failed to give proper consideration to the evidence. As to the accuracy of the methods of survey followed by the respective surveyors, we certainly are not able to say that either so overwhelmingly preponderates over the other; and when we pass to the physical facts as confirmatory of the one or the other we find some of them strongly supporting the McKesson survey. Immediately at the point in dispute the fences, especially on the south side of the road, and the line of travel, have been so various and indiscriminate

that they are of little significance as indicating the true line of original survey. Many of the reasons therefor were set forth in the statement of facts in *Randall v. Rovelstad,* 105 Wis. 410, 81 N. W. 819. But at other places, somewhat remote, the highway has been much more persistently maintained, and especially at a point nearly a half a mile east of the place of dispute, where commences a long straight course eastward of eighty-five chains. At this point the McKesson survey corresponded substantially with the middle of the road as traveled and fenced since very early days, while the Powrie survey was nearly two rods further south. Again, at a point approximately one fourth of a mile southeast of plaintiff's premises, the original survey runs to a bridge as a monument. The Powrie survey strikes a bridge over the watercourse at that point now in use, but there was testimony which, if believed by the court, established that the bridge over that watercourse existing prior to 1851 was elsewhere, and further to the northward, and that the bridge struck by Powrie was not built until subsequent to 1857. McKesson, and another surveyor, who followed his line, found clear indication of the ancient bridge across this watercourse, corresponding with the line as run by them. This fact is very cogent, for the bridge is the first monument mentioned in the original survey running easterly from the quarter-section line to the west of plaintiff's premises. Again, the judgment in the action of the town of *Wheatland v. McGarry,* the present plaintiff, decided in connection with *Randall v. Rovelstad,* certainly established that, as between the plaintiff and the town, with whom defendants are in privity as its officers, the plaintiff's buildings were not within the lines of the highway, but confessedly they would impinge on the highway if Powrie's lines were correct. There is, therefore, this piece of conclusive evidence by *res adjudicata* that the Powrie survey is wrong, although it may not tend to establish that the McKesson survey is correct. As a result, however, of all the evidence, of which

only a few items have been mentioned, we conclude that there was support for the finding that the line as run by McKesson corresponded with the survey as originally made in 1840.

As to the second question, namely, the width of the highway as originally laid out by the county commissioners of Racine county, we are first confronted with a statute—sec. 5, No. 24, p. 33, Terr. Laws of 1840—in force at the time that the highway in question was surveyed. That statute provides:

"The established width of all territorial, town, and county roads shall be sixty-six feet, and the line, run by surveyors, shall be the center of the road, unless otherwise described in the return."

Conceding that it would have been within the power of the county commissioners to have laid this road only three rods wide, this statute raises a conclusive presumption to the contrary, unless the return of the commissioners showed that fact. That entire return, as stated in the *Rovelstad Case,* is not accessible—merely the survey; and it is not impossible that extrinsic evidence might suffice to establish that it did provide for a three-rod road. The only evidence offered, however, is location of the fences, and some attempt to prove reputation. The evidence as to location of fences is that at the present time they vary from seventy-eight links to ninety-three links apart, there being no very marked persistency to either width, although it is stated that the average is nearer three rods than four. It is, however, made apparent—as, indeed, common knowledge would suggest—that the present fences are nearer together than the ancient ones; that is, as old fences have worn out, or for other reasons been changed, the new ones have been crowded further into the highway, and there is an intimation that at certain places, about ten years ago, certain farmers moved fences from approximately the four-rod line to approximately the three-rod line, in pursuance of a contention that the road was only three rods, although at that time

the highway officers insisted that it was four rods wide. As to this class of evidence, it seems to us that it cannot be allowed to overcome the very cogent effect of the statute above quoted. Indeed, we think the location of the fences has very little, if any, tendency to prove a highway of three rods in width. Throughout almost the entire course those fences were built further apart than three rods, and, while they are less than four rods, yet the known custom and tendency of farmers to crowd their fences toward the street instead of away from it gives to mere irregular encroachments little or no evidentiary effect, while the fact that throughout a large part of the line the fences are built on a basis of more than three-rod width, is well-nigh conclusive that the legal lines were not closer together. If, indeed, the fences had been persistently close to the three-rod line, with aberrations preponderantly toward encroachment thereon, the fact might be a significant one; but when they are persistently outside of that line, we think, instead of tending to prove a legal width of three rods, they quite conclusively disprove it.

The attempt to prove reputation quite completely failed. Substantially every witness whose memory reached back prior to a period of dispute—about 1890—frankly declared that there was no general reputation; that the road was claimed to be four rods as frequently and as vehemently as it was claimed to be only three rods in width. We are therefore constrained to the view that the trial court erred in this finding of fact. Either he failed to give to the statute of 1840 its full force, or he must have misapplied the evidentiary effect of the fences which encroached beyond the four-rod line without reaching the three-rod line. We are satisfied that the evidence is not sufficient to defeat the effect of the statute, and that we must presume, in deference thereto, that this highway was legally laid out at a width of four rods.

The result of the conclusions above reached is that the fence in front of plaintiff's premises, parallel to the course of the

road, extended into the public highway about eight feet, and, as it worked an almost complete obstruction of the traveled portion of the highway, the defendants, town officers, were guilty of no trespass in peaceably, though forcibly, removing the same; but, as they did not content themselves with removing those portions of the fence which were within the highway, but extended the demolition of the two north and south fences at each end of this lateral fence back to a point about one and a half rods—that is to say, at least one rod beyond the limits of a four-rod road upon the McKesson survey,—they thereby did trespass upon plaintiff's premises to that extent. Hence the plaintiff is entitled to recover damages, but in an amount reduced somewhat, relatively to the extent of the trespass found by the court, as compared with that now found to have been committed. We think a change of damages from $25 to $10 will accomplish that result.

That portion of the judgment, also, which enjoins the defendants from molesting or interfering with any structures of the plaintiff allowing only for a public easement of a three-rod road along the line of the McKesson survey is erroneous to the extent of one half rod. Such injunction must be limited so as to allow for a public easement of four rods, instead of three rods.

*By the Court.*—The judgment appealed from is modified by deducting $15 from the amount of damages awarded thereby, and by limiting the injunction to interference with fences, buildings, or other structures of the plaintiff upon the premises in the judgment described, allowing for a public easement of a four-rod road along the northern boundary thereof. As so modified, the judgment is affirmed. Appellants will recover costs in this court.

IREY, Appellant, vs. GORMAN, Respondent.

*April 21—May 8, 1902.*

***Replevin: Property taken on attachment: Possession of receiptor.***

**The possession of a receiptor for property taken under a lawful writ of attachment is the possession of the officer to whom he is accountable, and replevin to recover such property cannot be maintained by the defendant in the attachment suit while that suit is still pending.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

An action of replevin instituted by plaintiff for the recovery of a mare named Mabel L., of the alleged value of $1,000. Plaintiff gave the undertaking required by statute for the delivery of the property. Defendant answered by way of general denial, and alleged that he was in lawful possession of the mare, upon the grounds, first, that at the time of the commencement of this action the mare was in his possession as receiptor of the officer who had taken her under writ of attachment in an action then pending in justice's court upon complaint of one A. T. Malley against this plaintiff; secondly, upon the ground that he held the mare by virtue of a lien for her board and feed. It appears that the plaintiff owned the mare in the spring of 1899, and delivered her, pursuant to an agreement, to A. T. Malley, of Council Bluffs, Iowa, for training and racing purposes in the states of Iowa and Nebraska for the season of 1899; that Malley received her for such purposes for the season, and then proceeded to the South, finally reaching Atlanta, Georgia. During the winter season Malley applied to plaintiff for financial assistance, which he declined, but insisted that the mare be redelivered to him. Malley then, in the early part of February, 1900, shipped her to Milwaukee. Upon her arrival he arranged with one

Crocker for her board and care, who held her under this arrangement until March 21st, when the defendant, *Gorman,* pursuant to an arrangement with Malley, paid the amount advanced for freight and her board, amounting to $85. Defendant had no negotiations with plaintiff when he took the mare into his possession. Ten days thereafter Malley brought an action, upon a claim for money alleged to be due him, against *Irey,* in justice's court in Milwaukee county, and attached the mare. The officer, under such writ of attachment, levied upon the mare, and then placed her in possession of the defendant, *Gorman,* who held her as receiptor when *Irey* instituted this action of replevin. *Irey* appeared in the attachment suit, defended the same, and appealed from a judgment against him to the superior court for Milwaukee county, where the action is still pending. This action was tried in May, 1902, in the circuit court for Milwaukee county. The court directed a verdict in favor of defendant, upon the ground that, at the time plaintiff instituted this suit in replevin, Mabel L. was in defendant's custody as receiptor of the officer who had levied upon her in the attachment suit against the plaintiff in this action.

*Adolph Huebschmann,* for the appellant.

For the respondent there was a brief by *Fiebing & Killilea,* of counsel, and oral argument by *O. J. Fiebing.*

SIEBECKER, J. This case comes within rules announced by this court in its earliest decisions. The officer for whom defendant claims to have acted as custodian of the mare when this replevin action was instituted held her by virtue of a writ of attachment in an action against the plaintiff. The attachment suit is still pending. In a case where the parties were similarly situated, this court said:

"The general doctrine that an officer is protected in his acts performed in obedience to the command of a valid process placed in his hands to be executed is too well settled to be

doubted. In this case the writ of replevin commanded the officer to take the property in dispute and deliver it to the plaintiff upon his giving the bond required by the statute. We see no reason why the officer should be made liable to an action for doing that which his duty required of him." *Watkins v. Page,* 2 Wis. 98, subsequently approved in *Weinberg v. Conover,* 4 Wis. 803, *Griffith v. Smith,* 22 Wis. 646, and other cases.

The defendant asserts a legal right to the possession of this mare as receiptor to the officer who had levied upon and held her under the writ of attachment in an action against the plaintiff. It is abundantly established by express adjudications that a receiptor to an officer for property which has been taken by a lawful writ is in possession for such officer. His possession is, in law, that of the officer to whom he is accountable. When he is shown to stand in that relation to the officer, he may rest his right to maintain possession upon this principle, as against the plaintiff's claim. *Stern v. Riches,* 111 Wis. 589, 87 N. W. 554; *Mayhue v. Snell,* 37 Mich. 305; Wells, Replevin, § 131. The defendant alleged and proved that at the time of the commencement of this replevin suit he was in possession as receiptor to the officer who had attached the mare in a suit against the plaintiff as owner.

Some claim is made that the evidence fails to show that the acts of the officer under the writ of attachment in justice's court against this plaintiff did not constitute a levy, in the law. We think it appears sufficiently that the levy was properly made under the writ, and that the defendant did receipt to the officer for the mare. The motion for direction of a verdict in defendant's favor was properly granted.

*By the Court.*—Judgment affirmed.

ALLISON, Respondent, vs. MANZKE and others, imp., Appellants.

*April 21—May 8, 1903.*

*Mortgages: Assignments: Priority:* Bona fide *purchaser: Construction of statutes.*

1. Under sec. 2241, Stats. 1898 (providing that every conveyance of real estate within this state which shall not be recorded, as provided by law, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall first be duly recorded), the term "conveyance" embraces a mortgage, and the term "purchaser" embraces a mortgagee.
2. K. held certain lands under a contract for purchase and negotiated a loan of $2,500 from plaintiff's assignor, and on September 7 executed therefor a note secured by mortgage on such land. The vendor under the land contract executed a deed confirming the title in K. on September 6, which he acknowledged September 8, and recorded September 12. This deed recited a consideration of $1,450, although the land was worth $3,500. Upon September 13, plaintiff's assignor, upon assurances from the records of perfection of title in K., paid over $2,000, received the note and mortgage, and immediately placed the same on record, and two days later paid over the remaining $500. Two other mortgages on the premises were executed by K. on September 1, but were not recorded until September 14. *Held*, that by force of the statute (sec. 2241, Stats. 1898), the mortgages executed by K. on September 1, and recorded September 14, were void as against that held by plaintiff, a subsequent purchaser in good faith and for a valuable consideration.
3. In such case, the mere fact that plaintiff's assignor made no inquiry as to whether K. had given any mortgage on the premises before receiving his deed is without significance.
4. The assignee of a chose in action stands exactly in the shoes of his assignor. He succeeds to all his rights and privileges, but acquires no greater right than his assignor had in the thing assigned.
5. Plaintiff was assignee of H., a mortgagee whose mortgage was superior to that of defendant's assignor by reason of having been first recorded. Defendant's assignment was, however, recorded before that of plaintiff. *Held*, that the recording of defendant's assignment gave him no superior lien on the mortgaged premises, as against H., or plaintiff as his assignee, than that possessed by defendant's assignor.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was commenced March 22, 1901, to foreclose a mortgage executed September 7, 1894, by the defendants Frank Kosecki and wife, to one Henry Herman, upon the lands described, and which mortgage was recorded in the register's office September 13, 1894, and was given to secure a promissory note for $2,500, executed by the said Frank Kosecki, to the said Herman at the same time as the mortgage, payable three years from that day, with interest semi-annually at six per cent. per annum. The complaint, among other things, alleges, in effect, that January 6, 1896, the defendant land company acquired title to the land covered by the mortgage by deed which was recorded, and afterwards, for value received, it procured an extension of the time of payment of the note and mortgage to September 7, 1900, and assumed and agreed to pay the same; that March 18, 1900, Henry Herman, in consideration of $2,500 paid to him by the plaintiff, duly sold, assigned, and transferred said note and mortgage to the plaintiff by written assignment, which was recorded on that day; that the mortgagors and the land company had made default in payments; that there was due thereon the amount therein stated; that the other defendants had or claimed to have some interest in or lien upon the mortgaged premises, or some part thereof, which interest or lien, if any, had accrued subsequently to the lien of the plaintiff's mortgage.

The defendant *Herman Manzke* separately answered by way of counterclaim, and alleged, in effect, that Frank Kosecki and wife executed another note and mortgage September 1, 1894, to one Charles Hahn, for $300, and recorded the same September 14, 1894, and which were assigned by Hahn to the defendant *Manzke* October 31, 1894, and the assignment thereof was recorded December 14, 1896,

and prayed judgment for the foreclosure of the same, and that the same be adjudged to be a lien prior to the mortgage of the plaintiff, and prior to any and all liens of any of his codefendants.

The defendants *Amalia Kramer,* as widow and administratrix of the estate of Emil Kramer, deceased, and *Arthur Kramer,* separately answered by way of counterclaim, and alleged, in effect, that Frank Kosecki and wife executed another note and mortgage September 1, 1894, to the said Charles Hahn, for $400, covering the property described, and the same was recorded September 14, 1894, and said note and mortgage were duly assigned to the said Emil Kramer December 15, 1896, and the assignment thereof was duly recorded on that day; that said note and mortgage had been foreclosed, and the mortgaged premises sold on the judgment of foreclosure and sale to Emil Kramer, and a sheriff's deed was executed thereon to him, and the same was recorded December 26, 1900; and prayed judgment that the *Kramers* have title to the mortgaged premises free and clear from any incumbrances except the *Manzke* mortgage.

The plaintiff, by way of reply, put in issue each of such counterclaims. The several dates of executing the respective mortgages and the recording of the same, and the assignments of the respective notes and mortgages and the recording of such assignments, are undisputed, and are as stated above.

At the close of the trial the court found, in addition to the facts stated, so far as they relate to the issues here involved, in effect: (3) That Herman was induced to loan to Frank Kosecki the $2,500, and to receive as security for the repayment thereof the note and mortgage for that amount, mentioned, upon the representations made to Herman by Frank Kosecki that he was the owner of the mortgaged premises; that they were free and clear of all liens and incumbrances, and that such mortgage would be the first lien

thereon, and that at the time of recording that mortgage the records in the register's office showed such to be the facts after examination by a competent and reliable abstracter; that, relying upon such representations and records, Herman loaned the $2,500, and received therefor the note and mortgage mentioned; (7) that the plaintiff is the owner of the Herman note and mortgage and the assignment of the land contract mentioned, and that there is due thereon from Frank Kosecki and the land company the amount therein stated; (11) that all the allegations contained in the complaint in this action are proven and true; (12 to 21) that, after finding the amount due on the notes and mortgages so assigned to and held by *Manzke* and *Kramer,* respectively, it was found that said two mortgages were concurrent, and the liens thereof equal and concurrent; (22) that in the foreclosure of the note and mortgage so held by the *Kramers* neither *Manzke* nor Herman nor the plaintiff herein were made parties thereto, and that judgment was entered therein October 10, 1899, without either of them being made parties therein; (23) that Emil Kramer died March 8, 1901, and the other *Kramers* mentioned succeeded to his right therein; (24) that the several amounts due for taxes were as found; (25) that the value of the premises was inadequate to pay all the liens thereon; (26) that notice of the pendency of the action, as required by sec. 3187, Stats. 1898, was filed in the register's office March 28, 1901. As conclusions of law the court found, in effect, that the plaintiff's mortgage was the first lien upon the mortgaged premises, and that all the liens of the other defendants were subordinate and subsequent thereto; that the plaintiff was entitled to judgment of foreclosure and sale of the mortgaged premises, as prayed in her complaint; that the mortgages held by *Manzke* and *Kramer* were both subsequent and subordinate to the lien of the plaintiff's mortgage, but, as between themselves, were concurrent mortgages, and the liens thereof were equal and con-

current; and that the plaintiff was entitled to the appointment of a receiver, and judgment as therein found.

From the whole of the judgment entered according to such findings the defendants *Manzke* and the *Kramers* appeal to this court, except that part thereof wherein the amount due the plaintiff for principal, interest, premiums on insurance, and solicitor's fees are adjudged.

*Harlow Pease* and *Gustav Buchheit,* for the appellants.

For the respondent there was a brief by *E. G. Comstock,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *J. B. Doe.*

Cassoday, C. J. It is conceded that the two Hahn mortgages were executed six days prior to the date of the Herman mortgage. It is conceded that the Herman mortgage was recorded one day prior to the recording of either of the Hahn mortgages. It is also conceded that each of the three mortgages covers and includes the same premises. The question to be determined is whether, by virtue of the statutes, the liens of the Hahn mortgages are subject and subordinate to the lien of the Herman mortgage by reason of the last-named mortgage having been first recorded. The statute declares that:

"Every conveyance of real estate within this state hereafter made . . . . which shall not be recorded, as provided by law, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall first be duly recorded." Sec. 2241, Stats. 1898.

There can be no question but that the term "conveyance," as used in that section, must be construed to embrace a mortgage, and that the term "purchaser," as so used, must be construed to embrace a mortgagee. Sec. 2242, Id. Herman was certainly a "purchaser" subsequent to Hahn, and his mortgage or "conveyance" was first "duly recorded," within the

meaning of the statute. Id. The question, therefore, is reduced to this: Was Herman such "purchaser" in good faith, and for a valuable consideration? It is undisputed that he paid the full consideration of the mortgage. The appellants claim that he was not a purchaser in good faith within the meaning of the statute. In support of such contention it is said that at the time of the execution of the Herman mortgage the title to the mortgaged premises was in one Clara D. Farrington, from whom Frank Kosecki held a contract for its purchase. Of course, the same was true when the Hahn mortgages were executed six days before. The deed from Clara D. Farrington to Frank Kosecki was dated September 6, 1894, and acknowledged September 8, 1894, but was not recorded until September 12, 1894. It recited a consideration of $1,450. It appears that a part of the loan from Herman was used to pay Clara D. Farrington the balance due her on the land contract. After the deed from Farrington to Frank Kosecki had been recorded, and assurances had been given as to the perfection of the title, and Herman had examined the premises, and on the morning of September 13, 1894, Herman gave his check to Louis Auer & Sons, through whom the loan was negotiated, for $2,000, and received from them the note and mortgage, and he immediately put the mortgage on record, and two days afterwards gave his check for the balance. Manifestly, the papers were held by the persons so negotiating the loan from September 7, 1894, when the application therefor was made, until September 13, 1894, for the purpose of perfecting the title. There is nothing to impeach the good faith of Herman in the transaction. The evidence is ample to justify the trial court in holding that Herman was a "purchaser in good faith and for a valuable consideration," within the meaning of the statute. The mere fact that Herman made no inquiry as to whether Kosecki had given any mortgage on the premises before receiving his deed from Farrington is without significance.

Nor is the fact that that deed recited a consideration of $1,450. Evidently Herman regarded the lands as good security, and the findings of the trial court seem to indicate that the lands were of the value of $3,500 when the judgment was entered. The next day after the Herman mortgage was so recorded, the two Hahn mortgages were recorded. The statute quoted in effect declares that those two mortgages were "void, as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate," as it is found to be true in respect to Herman. Had Herman retained his mortgage, and foreclosed the same, and Hahn had retained the two mortgages so taken by him, there could have been no reasonable doubt but that the lien of the Hahn mortgages would have been subject and subordinate to the Herman mortgage.

2. But counsel for the appellants seem to think that the superior lien of the Herman mortgage had become subordinate to the lien of the Hahn mortgages, because the assignments of the Hahn mortgages had been recorded before the assignment of the Herman mortgage to the plaintiff. In support of such contention counsel seem to rely on *Butler v. Bank of Mazeppa,* 94 Wis. 351, 68 N. W. 998. It is true that in that case it was held that "an assignee of a mortgage is a 'purchaser,' and the assignment is a 'conveyance,' within the meaning of" the sections of the statutes cited; but it was also expressly held in that case that, "in order that the assignee's lien may take precedence over another mortgage, which, although a prior lien, was not first recorded, the assignment must have been recorded prior to the recording of the latter mortgage." In that case the mortgages "were apparently contemporaneous in execution," but Fowler (one of the mortgagees) "knew when he took his mortgage" that "the plaintiff's mortgage was simply an extension *pro tanto* of his previously existing purchase-money mortgage," and he "voluntarily accepted it with the knowledge that it was in-

tended to be, as it was in fact, a subsequent lien." That case was quite similar in principle to the more recent case in this court, *Trompczynski v. Struck,* 105 Wis. 437, 440, 441, 81 N. W. 650. Neither of those cases sustains the proposition for which counsel for the appellants contend. It is elementary that "the assignee of a chose in action stands exactly in the shoes of his assignor. He succeeds to all of his rights and privileges, but acquires no greater right than his assignor had in the thing assigned." 2 Am. & Eng. Ency. of Law (2d ed.) 1079; *Kinney v. Kruse,* 28 Wis. 183,190; *Parmalee v. Wheeler,* 32 Wis. 429. We must hold that the recording of the assignments from Hahn gave to the holders thereof, respectively, no superior lien upon the mortgaged premises, as against Herman, and the plaintiff as his assignee, than that possessed by Hahn.

*By the Court.*—The judgment of the circuit court is affirmed.

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SECOND NATIONAL BANK OF RICHMOND, INDIANA, Respondent, vs. SMITH, imp., Appellant.
SAME, Respondent, vs. HERMAN, imp., Appellant.

*April 21—May 8, 1903.*

*New trial on payment of costs: Presumption: Appeal and error: Jurisdiction: Mandatory statutes: Bills and notes: Protest: Notice of dishonor: Sufficiency and evidentiary character of notary's certificate: Evidence: Waiver.*

1. A new trial having been granted upon payment of costs, no reasons being assigned, the presumption arises that the verdict was set aside for errors of the jury; but, in such case, where the verdict was directed by the court it conclusively shows that the new trial was granted because of errors of the court.
2. Where a new trial is granted for error of the court, while the imposition of costs is error, it is not an error of which the appellant can complain where the costs were imposed upon the respondent.

3. Sec. 2878, Stats. 1898, as amended by ch. 100, Laws of 1901 (providing that a motion for a new trial "can only be heard at the same term at which the trial was had," and "if such motion be made, but not decided during such term, it shall be taken as overruled, and an exception to such constructive denial of the same shall be allowed in the bill of exceptions"), is not mandatory or jurisdictional in the sense that its requirements may not be waived by the parties. Thus where the judge announced that a motion for a new trial would be decided on a certain day within the term, and, upon request of counsel, postponed the announcement of his decision until a later day, which was the first day of the next term, in fairness to the trial court and opposing counsel, the requirements of the statute should be held to have been waived.
4. In an action against indorsers of a note dated in Wisconsin but actually executed, negotiated, and made payable in Indiana, the law of Indiana controls as to days of grace and the manner of giving notice of dishonor to the indorsers, while in the courts of this state, the law of Wisconsin controls as to the kind and sufficiency of the evidence necessary to prove such notice.
5. In the absence of proof of the law of Indiana relative to what notice of dishonor is required by the law of that state to fix the liability of an indorser, the presumption is that it is the same as that of Wisconsin.
6. Under the laws of both Wisconsin and Indiana, the official certificate, under seal, of a notary who protests a bill or note, is presumptive evidence of the fact therein stated.
7. Sec. 1678—25, ch. 356, Laws of 1899, requires that notice of dishonor to the indorsers of a note shall identify the instrument and indicate that it has been dishonored. Sec. 176, Stats. 1898, provides that the notary shall set forth in his certificate the contents of the notice. A certificate of the notary stated that the original note itself, "of which the above is a true and complete copy," was presented and payment refused, and that it was protested; that notice of protest of "the before-mentioned note" was served on the indorsers by depositing copies of the notice addressed to them, in the postoffice. *Held*, the certificate sufficiently complied with the statutory requirements and sufficiently stated the contents of the notice served.
8. In such case, evidence of defendant as an adverse party before trial, which tended to show that he received timely notice of dishonor of the note, considered, and *held* sufficient to require submission to the jury of that question, even had the notary's certificate been insufficient.
9. In such case, there was uncontradicted evidence, given by the

**officers of plaintiff, that S., who as an officer of the maker executed the note, and who was liable as an indorser, stated that if they would wait until four o'clock of the day on which the note matured, he would come to the bank and pay it. *Held*, that such evidence was sufficient to require the submission to the jury of the question of waiver of protest and notice thereof.**

APPEALS from orders of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action brought by the plaintiff, a national banking corporation at Richmond, Indiana, to recover from the defendants the principal and interest on a promissory note which was indorsed by them before delivery, a copy of which note is as follows:

"$8,330.31. Milwaukee, Oct. 18, 1900.

"Sixty days after date I promise to pay to the order of A. E. Smith, H. Herman, eight thousand, three hundred and thirty and 31-100 dollars, at the Second National Bank, Richmond, Indiana, value received, with interest at the rate of six per cent. per annum.

"C. E. Loss & Co.
"Per A. E. SMITH, Treasurer."

The maker of the note was an Illinois corporation, and was not joined as a party. The defendant *Smith* was treasurer of the corporation maker, and executed the note on behalf of the corporation. The defendants answered, alleging payment of the note, and also claiming that no notice of protest thereof had been served. The action was tried by a jury at the April term of the circuit court for Milwaukee county. Upon the trial the plaintiff introduced the note in evidence, with a certificate of protest attached thereto, which certificate reads as follows:

"United States of America, State of Indiana, Wayne County—ss:

"By this public instrument of protest be it known that on the 20th day of December, A. D. 1900, I, Everett R. Lemon, a notary public for the county of Wayne, in the state of Indiana, by lawful authority, duly commissioned and sworn, residing in Richmond, in the county and state aforesaid, at the

request of the Second National Bank of Richmond, Ind., holder of the original note of which the above is a true and complete copy, presented the same to the Second National Bank of Richmond, Ind., and demanded payment thereof, which was refused, whereupon I, the said notary, by the authority aforesaid, did protest, and by these presents do solemnly protest, as well against the drawer of the said note, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages, and interest suffered or to be suffered for the want of payment of the said note. And I do hereby certify that notice of the protest of the before-mentioned note was served upon the maker and indorsers of said note in the following manner, to wit: By depositing a copy of such notice in the post office at Richmond, addressed to each—the maker, C. E. Loss & Co., at Chicago, Illinois, and the indorsers, A. E. Smith, Milwaukee, Wis., and H. Herman, Milwaukee, Wis.

"In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year above written.

"EVERETT R. LEMON."

The plaintiff also proved nonpayment of the note, and introduced the evidence of the notary who made the protest, to the effect that he mailed to each of the defendants notices of such protest December 20, 1900, not stating the contents of the notices. After offering some other evidence, the plaintiff offered vol. 3, Annotated Statutes of Indiana for 1894—particularly secs. 7528 and 8040, which last-mentioned section reads as follows:

"8040 (5965). Certificate, as Evidence. (6) The official certificate of a notary public, attested by his seal, shall be presumptive evidence of the facts therein stated in cases where, by law, he is authorized to certify such facts."

Plaintiff then rested, and the defendants also rested, and moved that a verdict be directed in their favor for the following reasons:

"(1) Plaintiff has not proved the law of Indiana. (2) Plaintiff has not proved that the note is entitled to grace. (3) Plaintiff's proof shows the note to have been protested

after it was due. (4) Defendants are entitled to have a verdict directed in their favor because there is no proof of service of due notice of presentment and dishonor, and the laws of this state and Indiana alike require that to be proved before an indorser can be held."

After this motion was made, the plaintiff offered in evidence vols. 1 and 2 of the Revised Statutes of Indiana for 1881, and a colloquy ensued between counsel and the court, from which it appeared that the plaintiff's counsel supposed that the court before the close of the case had given permission to the counsel to introduce the Revised Statutes, while the court and defendants' counsel understood that permission was only given to introduce vol. 1, Annotated Statutes of Indiana for 1894. Thereupon plaintiff's counsel moved to reopen the case, and for leave to introduce the Revised Statutes of 1881, with the title page thereof, showing publication by authority of law. This motion was finally granted, and said Revised Statutes received in evidence, and the following sections read:

"5506. What Negotiable as Inland Bills. Notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange, and the payees or endorsees thereof may recover as in case of such bills."

"5514. On all bills of exchange within the state, whether sight or time bills, three days of grace are allowed."

After the introduction of the statutes the plaintiff again rested, and the defendants renewed their motion for the direction of a verdict on the same grounds as before. A recess was then taken, and after the recess plaintiff's counsel moved to reopen the case again for the purpose of calling as a witness Mr. Lemon, the notary who protested the note; stating that he would have the witness in court at the opening of the morning session on the following day. This motion was denied, and the plaintiff thereupon moved to direct a verdict for the plaintiff. This motion was overruled, and the defendants' motion to direct a verdict was granted, and a

verdict for the defendants rendered. Thereupon plaintiff's counsel moved for a new trial of the action, and a stay of the proceedings pending the motion, which motion was taken under advisement May 15, 1902. On July 7, 1902, after the opening of the July term of said court, the motion for a new trial was granted, by an order which, as finally modified, reads as follows:

"A motion to set aside the verdict heretofore rendered by direction of the court herein, and for a new trial, having been made by plaintiff, and argued and submitted at the same term at which the trial of said action was had, and the court having taken said motion under advisement, and being ready to decide the same on the 3d day of July, 1902, and having on the 2d day of July, 1902, announced in open court that the decision of said motion would be handed down upon the 3d day of July, 1902 (that day being of the same term at which said action was tried), and defendants' counsel having then and there stated to the court that he would be absent from the city and unable to attend court on July 3d, and the court having announced in open court at the same time that no court would be held on Saturday, July 5th, and defendants' counsel having stated that he would like to be present when the decision of the court was made, and would therefore like such decision to be announced at a later date, the court thereupon stated that the decision would be announced on Monday morning, July 7, 1902, and thereupon defendants' counsel stated that he would be unable to be present personally on that day, but would make arrangements to be represented; and the court being now well and sufficiently advised in the premises, and ready to announce said decision in accordance with such statement so made on the 2d day of July, 1902, as above set forth, and on motion of Quarles, Spence & Quarles, attorneys for said plaintiff, it is hereby ordered that the motion of said plaintiff to set aside the verdict heretofore rendered herein, and for a new trial of the above-entitled action, as against each of the defendants, be, and is hereby, granted. It is hereby further ordered that, before any new trial shall be had, said plaintiff shall pay to said defendants, or their attorney, the costs and disbursements of the trial heretofore had in this action."

Due exception was taken by the defendants to this order, and they subsequently moved on affidavits to set the same aside, which motion was denied; and the defendants appealed separately from the order granting the new trial, and from the order refusing to set the same aside.

*Joseph B. Doe,* for the appellant.

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *W. C. Quarles.*

WINSLOW, J. There was no error in reopening the case after the parties had rested, and allowing the plaintiff to offer additional evidence; nor is it claimed by the appellants that such action was erroneous, but they do claim that the court had no power to grant the motion for a new trial after the expiration of the term at which the case was tried. The motion, though meager in its terms, must doubtless be considered as a motion made upon the minutes of the judge, under sec. 2878, Stats, 1898, as amended by ch. 100, Laws of 1901. When such a motion is granted without the assignment of reasons, as here, the presumption is that it was granted for error of the jury, or because the court was dissatisfied with the verdict, as being inconsistent or against the weight of the evidence, if terms be imposed; but, if terms be not imposed, then the presumption is that it was granted because of errors of the court, or because the court regarded the verdict perverse. *Giese v. Milwaukee E. R. & L. Co.* 116 Wis. 66, 92 N. W. 357. This presumption, however, is not conclusive, and may be overcome by other facts appearing in the record. In the present case, while the imposition of costs raises the presumption that the verdict was set aside for errors of the jury, and not for errors of the court, the fact that the jury did nothing but to render the verdict directed by the court conclusively shows that the court granted the new trial because it concluded it had erred in directing a verdict for the defendants. The imposition of costs was

doubtless error, but not an error of which the defendants can complain. Sec. 2878, *supra,* prior to its recent amendment, provided, and still provides, that such motion "can only be heard at the same term at which the trial is had." By ch. 100, Laws of 1901, an additional clause was added to the section, in the following words:

"If such motion be made, but not decided during such term, it shall be taken as overruled, and an exception to such constructive denial of the same shall be allowed in the bill of exceptions."

The appellants' claim is that this provision is mandatory and jurisdictional, and hence cannot be waived by the parties, and that, even if it could be waived, there has been no waiver in this case. We are unable to agree with the contention that the provision is mandatory or jurisdictional in the sense that the parties may not waive its requirements. Its object evidently is to protect the parties to the action, not the public, to expedite business, and to insure an appellant against difficulties or embarrassments likely to result from inaction or neglect by the trial court. Were public policy or interests involved, the question would be quite different, but, where such a provision is imposed simply for the benefit of the parties, the principle is well settled that its benefits may be waived by those parties, if they choose. The facts recited in the order granting the motion for a new trial are quite sufficient to constitute such a waiver by the appellants. The court announced that the motion would be decided July 3d, which was a day still within the trial term, and also announced that no court would be held July 5th. The appellants' counsel requested that the decision be announced at a later date, and the court, in pursuance of that request, postponed the making of the decision until Monday morning, July 7th, which was the first day of the July term. It is true that the court might have held open the April term until the morning of July 7th, and thus have fulfilled the letter of the

statute, by deciding the motion before the opening of the July term on that day; but to hold that, because he did not do so, he lost jurisdiction of the motion entirely, seems to apply a distinction more nice than reasonable. He did decide the motion on July 7th, just as appellants requested him to do. Apparently neither the counsel nor the court thought of the fact that a new term was then to open, or that such opening was of any consequence. Fairness to the trial court, as well as to opposing counsel, requires that the requirement of the statute be held to be waived.

This brings us to the consideration of the merits. A verdict for the defendants was directed in the first instance because the court was of the opinion that the evidence was insufficient to show that notice of dishonor had been given to the indorsers. The verdict was set aside, and a new trial granted, evidently because the court became satisfied that the direction was erroneous, and the sole question is whether the court was right in its final rulings on this point. The note itself, though dated in Wisconsin, was actually executed, negotiated, and made payable in Indiana; and hence, there being no other controlling circumstances in evidence, it must be considered an Indiana contract. *Newman v. Kershaw,* 10 Wis. 333; *Central T. Co. v. Burton,* 74 Wis. 329, 43 N. W. 141. The laws of Indiana therefore control upon all questions relating to the construction and legal effect of the contract, while the laws of the forum (i. e., the laws of Wisconsin) control as to the form of the remedy, the conduct of the trial, and the rules of evidence. *Eingartner v. Illinois S. Co.* 94 Wis. 70, 68 N. W. 664. Applying this principle to the present case, the result is that the law of Indiana controls as to days of grace and the manner of giving notice of dishonor to the indorsers, while the law of Wisconsin controls as to the kind and sufficiency of the evidence necessary to prove notice of dishonor. The laws of Indiana which were introduced in evidence proved conclusively that days of grace were

allowed in that state, and hence it appeared that demand of payment was made on the proper day, to wit, the 20th day of December, which was the last day of grace. No statute or decision of the state of Indiana was introduced, however, showing what notice of dishonor was required by the law of that state to fix the liability of an indorser. In the absence of such proof, the presumption is that the law of Indiana is the same as the law of Wisconsin. By sec. 1678—25, ch. 356, Laws of 1899 (the Negotiable Instrument Law), the notice may be written or oral, delivered personally or by mail, and may be in any terms which sufficiently identify the instrument, and indicate that it has been dishonored; and by sec. 1678—26 of the same law, a written notice need not be signed, and may be helped out by a verbal notice; nor does a misdescription of the instrument invalidate it, unless the party is actually misled. By the law of both states, the official certificate, under the seal of a notary who protests a bill or note, is presumptive evidence of the facts therein stated. Sec. 176, Stats. 1898; Annotated Statutes of Ind. 1894, § 8040. There can be no question, therefore, of the admissibility of the notary's certificate in the present case, nor of its presumptive effect as evidence. *Carruth v. Walker,* 8 Wis. 252. It is argued, however, that the officer has not certified as to the contents of the notice, and that hence there is no proof that any proper notice was mailed. Sec. 176, *supra,* provides that the notary shall set forth in his certificate the contents of the notice. As has been seen, all that the law now requires as to the notice is that it shall identify the instrument, and state that it has been dishonored, and the question is whether the certificate of the notary in the present case shows that the notice mailed by him filled these requirements. We think it does. The certificate fully shows that the note itself was presented, that payment thereof was refused, and that it was protested. It then states that notice of the protest of *the before-mentioned note* (i. e. the note of which a

copy is attached) was served on the indorsers by depositing copies of the notice in the post office. The only reasonable construction that can be given to this certificate as to the notice is that it was a notice that "the before-mentioned note" was duly protested for nonpayment. If the notice was to this effect, then it certainly identified the instrument, and indicated that it had been dishonored. We think, therefore, that the certificate sufficiently states the contents of the notice served.

As to the appellant *Smith* there are other considerations which do not apply to the appellant *Herman*. It appears that upon his examination under sec. 4096, which was introduced in evidence, he identified the note, and gave the following testimony:

"Q. Did you, on or about the 20th day of December, 1900, receive any notice of any kind, from the bank or any notary, that this note was unpaid? A. At a later date than that. Q. At what date? A. I don't remember—after the 20th. Q. How much after? A. I cannot give the exact date. Q. Was that notice in writing? A. Yes sir. Q. Have you it in your possession? A. No, sir. You mean here or— Q. It was within a day or two of the 20th, was it not? A. Yes, sir."

This testimony tended strongly to show that he received timely notice of the dishonor of the note, and it was certainly sufficient to go to the jury on that question, even had the notary's certificate been insufficient. There was also uncontradicted evidence given by the bank officers to the effect that *Mr. Smith* said to them on the 17th of December that if they would wait until Thursday, the 20th, until four o'clock p. m., he would come up to the bank and pay the note. This was sufficient evidence to go to the jury upon the question of waiver of notice of protest. *Worden v. Mitchell*, 7 Wis. 161; 2 Daniel, Neg. Inst. §§ 1103, 1104 (4th ed.). It is true that *Mr. Smith* was the person who, as an officer of the corporation maker, executed the note, and, if this promise was made

on behalf simply of the maker, it would not be a waiver of his rights as an indorser; but if, under the circumstances, the bank officers were entitled to understand and did understand from his statement that he meant that he would pay the note in his personal capacity as indorser, it is difficult to see why the promise did not amount to a waiver of protest, and notice thereof, if in fact the notice given proved to be defective. The question should have gone to the jury.

*By the Court.*—Orders affirmed on both appeals.

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VON TROTT, Appellant, vs. VON TROTT, Respondent.

*April 21—May 8, 1903.*

*Divorce: Alimony: Division of property: Discretion of trial judge: Costs: Appeal and error.*

1. Under sec. 2364, Stats. 1898 (providing that the court may adjudge to the wife such alimony out of the estate of the husband for her support and maintenance as it shall deem just and reasonable, or may finally divide and distribute the estate, both real and personal, of the husband between the parties), alimony is given for the nourishment of the wife, is only temporarily fixed by the judgment, is subject to judicial supervision and revision during the husband's lifetime, and can never be given in conjunction with a division of the husband's estate.
2. In an action for divorce a judgment ordering defendant to pay plaintiff $3,900 out of his estate of $14,000, "as alimony, support and maintenance, and as full and final division, partition and distribution of said estate" considered, and *held* to adjudge a final division and distribution of the husband's estate in lieu of alimony.
3. In an action tried by the court without a jury, the findings of fact will not be disturbed unless the preponderance of the evidence is clearly and decidedly against the findings.
4. In an action for divorce on the ground of adultery, guilt of the husband is a proper matter for consideration in the division of his estate, but the weight to be given such fact rests so exclusively within the discretion of the trial judge that, standing alone, failure to regard it is not prejudicial error.

5. It appeared, among other things, that plaintiff was left with no family cares after the separation, that she was quite advanced in years when she married defendant and had no children by him; that she neither brought him property, nor helped materially to accumulate his property; that she was a woman of more than ordinary accomplishments, in good health, and had children of mature age, educated in part by the aid of defendant, and from these children she could reasonably expect assistance if in need thereof. The husband's estate consisted of household furniture which had been equally divided between the parties without the aid of the court and $14,000 consisting of land and a stock of drugs. The judgment awarded plaintiff $3,900 in money as a final division and distribution of the husband's estate. *Held*, that thereby a full equivalent of one third of the immediate money equivalent of defendant's entire estate was awarded to the plaintiff.
6. Under sec. 2631, Stats. 1898, authorizing the court in actions for divorce to order the husband to make such payment to enable the wife to carry on the action as, in its discretion, shall be necessary or proper, the conclusions reached by the trial judge in such matter, except in case of clear abuse of such discretion, is not subject to review on appeal.
7. Appeals to the supreme court in cases where the respondent may be required to pay the costs of both parties, regardless of whether appellant prevails or not, are not to be encouraged by awarding costs regardless of the merits of the appeal, and hence, in an action for divorce, where $125 had already been awarded for expenses of the wife, and the appeal of the wife was without merit, the judgment was affirmed without costs to either party except that respondent was required to pay the clerk's fees.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action for divorce with incidental relief. The ground of the complaint upon which plaintiff recovered judgment was adultery of the defendant. The court concluded in respect to the matters material to a provision for plaintiff as regards property thus: Defendant owned at the time of the commencement of this action some real estate in the city of Milwaukee, a stock of merchandise such as is ordinarily kept in

a small drug store, 300 acres of land in the state of Texas, and a quantity of household goods and some other property, such property, however, not being in excess of his liabilities. The value of the Milwaukee real estate is $9,000, the drug store stock $3,000, the Texas land $1,000 and the household goods $1,500 to $2,000. Such goods were equitably divided between the parties without the aid of the court, plaintiff receiving about one half. The aggregate value of the other property is not in excess of $14,000. The net income of defendant from all sources is $1,025, somewhat over one half being for personal services. Plaintiff had no property whatever when she married defendant. She then had two infant children who were taken into defendant's family and supported by him until they became of age. She had no children by defendant. She is in fair health, the same not being sufficiently impaired, at least, to require medical treatment.

Upon that state of the case the court held that plaintiff ought to have out of defendant's property $3,900, the same being called an allowance for alimony, support and maintenance and as a full final partition and distribution of defendant's estate, to be paid $100 within ten days from date of judgment, $3,800 within six months from such date and to draw interest at six per cent. per annum till paid if not paid within two months from such date, and to be a lien upon defendant's real estate subject to permission to him to incumber the same by a mortgage for the purpose of raising money to satisfy plaintiff's demand, paying the proceeds of the loan into court for her use. It was further held that $150 as attorney's fees, in addition to all sums on that account previously allowed, should be paid by defendant, and that he should pay the taxable costs of the litigation, which were adjusted at $104.82. Judgment of divorce on findings sufficient for that purpose was entered, with a provision for plaintiff in accordance with the foregoing. During the litigation defendant was compelled to pay plaintiff for tempo-

rary support about $1,000 and for attorney's fees and suit money about $200.

*W. B. Rubin,* for the appellant.

*George L. Williams,* for the respondent.

MARSHALL, J. At first view of the judgment in this case we were not certain what kind of a provision the learned court purposed therein requiring respondent to make for appellant; that is, whether alimony was decreed to her, which would be subject, necessarily, to change thereafter if the circumstances of the divorced husband should change (*Bassett v. Bassett,* 99 Wis. 344, 74 N. W. 780); or whether a portion of respondent's property was decreed to her upon a final division of his estate between the parties, absolutely ending all relations between them of every nature. *Gallager v. Gallager,* 101 Wis. 202, 77 N. W. 145. Of course, it must be one thing or the other. The statute expressly so provides. Sec. 2364, Stats. 1898. The language thereof is as follows:

"The court may adjudge to the wife such alimony out of the estate of the husband for her support and maintenance . . . as it shall deem just and reasonable, or the court may finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband, between the parties, . . . having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case."

Alimony is given for the nourishment of the wife. *Bacon v. Bacon,* 43 Wis. 197. The amount thereof is only temporarily fixed by the judgment. It is subject to judicial supervision and revision during the life time of the husband upon the theory that, though the married relations may be in all respects, except duty to support the wife, ended, that duty remains a continuing burden upon the divorced husband so long as the parties both live and the wife remains in need of such

support. *Maxwell v. Sawyer,* 90 Wis. 352, 63 N. W. 283. It can never be given in conjunction with a division of the husband's estate, for the purpose of that is to render the parties strangers to each other, essentially the same as before the marriage, to compensate the wife once and forever, for the cancellation of all obligations of the husband to support the wife and all her claims of every nature upon his society or estate. So it is of importance to understand just what kind of a decree we have before us for review. What might be a proper provision as alimony might not be proper as a division of property, and *vice versa.* What might seem small as alimony this court might not see its way clear to disturb because of its being subject to subsequent revision by the trial court to adjust the same to changes in the circumstances of the parties. What might in a division of the property seem out of harmony with the circumstances of the husband either one way or the other, all things considered, this court might not feel warranted in disturbing on account of the very broad discretionary power over the subject vested in the trial court by statute. The language of the decree as to property matters is this:

"It is ordered, adjudged and decreed that the said defendant pay to the said plaintiff the sum of $3,900 out of said defendant's estate as alimony, support and maintenance, and as a full and final division, partition and distribution of said estate."

That is, appellant was given $3,900 as alimony, using substantially the language of the statute, but it was given at the same time, apparently, to be deemed appellant's share of respondent's estate upon a full and final division thereof. The language chosen to express the idea of an award of a portion of respondent's estate to appellant in lieu of alimony is very inappropriate for the purpose. It indicates want of understanding of the nature of alimony and of the requirements of the statute. However, appellant's counsel treats the decree

as awarding property in lieu of alimony, and taking the language thereof as a whole probably the trial court pronounced judgment that way, but counsel in preparing the decree for the judicial signature did not in form carry out that idea.

We have carefully considered the evidence in the case and the views of appellant's counsel in respect thereto, and are unable to come to the conclusion that the findings of fact are contrary to the clear preponderance of the evidence. Counsel urge upon us with much earnestness the duty, as he understands it, of examining the evidence and deciding the matters of fact involved as a court of original jurisdiction would do it. This court, of course, on appeal from a judgment in an action tried in the court below without a jury, must review the evidence to see if the findings of fact are supported thereby, if proper exceptions are taken to present such matters for such review; but that does not mean that the evidence must be examined here as a court of original jurisdiction would examine it in coming to the initial conclusions upon which the judgment should rest. That cannot be done from the very nature of things, because of the many aids which the trial court has for discovering the truth, which cannot be preserved upon the written or printed record of the trial. This court, upon proper exceptions in an action, reviews the evidence upon which the findings of fact were made by the trial court, but does so governed by established rules of appellate procedure. It is one of the unbending rules thereof that presumptions are to be indulged in favorable to the correctness of the findings of fact to the extent of precluding disturbance thereof unless the preponderance of the evidence not only appears to be against such findings but decidedly and clearly so. This court does not use judicial scales for the weighing of evidence. They are weighted down on one side at the start by the probability that the findings of the court involved are right. The preponderance of evidence the other way must necessarily be quite significant in order to incline

the balance that way. The rule in that regard has been evolved by long experience of appellate tribunals, and is deemed to be the one most likely in the end to best promote the ends of justice. *Endress v. Shove,* 110 Wis. 141, 85 N. W. 651.

Applying the rule mentioned to the record before us, after a careful review thereof, we are constrained to leave the decision of the trial court upon matters of fact undisturbed and to do so without embodying in this opinion any discussion of the evidence in detail. If the case were at all close on this branch of it such a discussion might well be indulged in and perhaps be called for, but we do not find it so. The trial court seems to have carefully considered the evidence and to have reached conclusions well supported at all points.

Assuming the facts upon which the court based the division of the property to be as found, there is little or no room for reasonable complaint that we can discover. Certainly, no ground worthy of serious consideration in face of the plain statute we have quoted, leaving the subject of how much of the husband's estate, upon a final division thereof, to award to the wife, to be solved by the trial judge within the broadest range which his judgment may reasonably take upon the evidence, subject to revision on appeal only in case of clear abuse of judicial power. That is the plain purpose of the statute. The trial court is not governed in such matters by any arbitrary rules other than those found in the statute as the same has been construed by this court. True, there are indications in the decided cases, in a general way, of the boundaries beyond which a trial court may not go; but the safe field in that regard is a very broad one, in harmony with the letter and spirit of the statute, and it would have to be very plainly overstepped to warrant relief therefor here.

It has been said that for temporary relief the wife should be granted one fifth of the husband's income. *Williams v. Williams,* 29 Wis. 517. Here we note that such proportion

was greatly exceeded,—a matter proper for consideration when making the final division. It has been said that the share of the husband's property to be awarded to the wife may properly range from a moiety to a third or even less, according to circumstances. *Varney v. Varney,* 58 Wis. 19, 16 N. W. 36. Here there were no special circumstances to aid the wife other than guilt of the husband, which did not really render appellant's situation any worse after the judicial separation than it would have been had the divorce been granted upon some other ground. True, such guilt was a proper matter for consideration in dividing the husband's estate, but what weight to give thereto was a matter so exclusively resting in the sound discretion of the trial judge that, standing alone, failure to regard it would not be considered fatally prejudicial. We see no indications in the record that the trial court did not in this case give due weight to such circumstance. Appellant was left with no family cares after the separation. She had borne respondent no children. She was quite advanced in years when she married him. She brought him no property. She did not aid him materially if at all to accumulate property. She was left in good health, apparently, as regards ability to support herself. She was a woman of more than ordinary accomplishments, apparently, rendering her more than ordinarily capable of successfully meeting, by her own efforts, the necessities of life. She had children of mature age, educated in part at least by the aid of respondent, and from whom she naturally had reasonable expectations of pecuniary and other assistance if in need thereof. They were, as it appears, capable of rendering such assistance and may be reasonably expected to so remain during her life. They were assisted to that situation materially at the expense of respondent. These and many other things that might be mentioned were very proper matters for consideration by the trial judge in reducing the amount of prop-

erty which under other circumstances might have been awarded appellant.

However, the equivalent of a full third of respondent's property was given to appellant in conformity to the precedents found in the books and referred to in *Varney v. Varney, supra,* and other cases. Counsel for appellant does not look at the decision of the court that way, because of an exaggerated notion, in our judgment, of what the evidence shows as regards respondent's property, and further because proper regard is not given to the fact that the provision for appellant is in the form of money. Several witnesses testified that the value of the Milwaukee real estate was around $9,000, which counsel seems easily to set aside in favor of witnesses who placed the value at a much higher amount, contrary to the judgment of the trial court. Counsel suggests the existence of $7,200 in money belonging to respondent's estate, none of which was found by the trial court to exist. We are unable to find in the evidence any satisfactory proof to create even a well-grounded suspicion that there was any such sum of money as $7,200, or any property other than what was found by the trial court. Counsel makes up his amount of $7,200 by charging respondent with the various sums of money borrowed through a period of some nine years, and the amount received for certain real estate sold, and crediting him with payments of various accounts and a loss of $2,500. The loss testified to by respondent was from $3,500 to $4,000. No credit is given for interest payments upon loans, which was evidently very large. No credit is given for several payments made by respondent of a large amount and specifically mentioned by him, and others that it appears clearly from his evidence he must have made. Appellant's attorney charges respondent with borrowed money to the extent of $9,700 and credits him with payments on loans with only $7,000. No credit is given for the balance of

the indebtedness of $2,700. It is counted as money on hand secreted or concealed, as counsel terms it. There are many other features of the account that might be referred to, indicating that a very exaggerated idea of the evidence is displayed in the brief of counsel, one which, of course, it cannot be expected that the trial court could have looked upon with favor. Respondent's income is referred to by counsel as being double what it was found to be by the trial court. Such finding, in our judgment, is well supported by the evidence.

Referring more particularly to the failure of counsel to regard the difference between property in the form of money and property measured by money in making a division of an estate consisting of real estate and merchandise, it must be kept in mind that while property must be measured in handling it and dividing it, if values are considered, in its money equivalent, fixing that upon the basis of the market value as determined from opinion evidence, that method only gives an approximation, and often times not a very close one. Common experience shows that a person may be in theory quite wealthy, looking at his possessions as valued upon opinion evidence, or even in his own judgment, and yet be poor in fact in face of a necessity to use the property presently in the form of money. It has been very plainly indicated by this court that failure to recognize the burden cast upon the husband in dividing his estate in a case like this and awarding a portion thereof to a divorced wife in the form of money, regardless of the difference we have indicated between awarding a money equivalent for real estate and goods and chattels, and awarding part of such property in specie, may well be deemed an abuse of judicial discretion. Why so? Because it is a matter of common knowledge that the immediate money equivalent of an estate consisting of various kinds of property, especially of lands and merchandise in the form of store goods of any kind, is materially less than the market value thereof, as that would ordinarily be determined upon

opinion evidence. For failure to recognize that, relief was granted here in *McChesney v. McChesney,* 91 Wis. 268, 64 N. W. 856, and *Roelke v. Roelke,* 103 Wis. 204, 78 N. W. 923.

In this case the household goods, to start with, were equally divided between the parties. That was done by agreement under some compulsion by the court pending the litigation. Exception is taken to that view by appellant's counsel, but upon reading the evidence we are inclined to think he is wrong. The other property, as specifically valued by the court, aggregates $13,000. Appellant was awarded money to the amount of one-third of such sum less $433.33. What the real money equivalent of respondent's estate was could not be told very definitely any other way than by actually turning the same into money. We should say that the amount awarded appellant, in all reasonable probability, was at least one third of the immediate money equivalent of the entire estate. In view of that and the fact that she got one half of the household goods, and especially in view of the fact that she got an excessive allowance for support pending the litigation, and all the other circumstances to which we have referred, and others that might be referred to, it seems that there is no reasonable ground to complain of the disposition of the property of respondent by the trial court. The division, under the circumstances, is one that should have been submitted to without further expensive litigation.

Complaint is made because the court limited the amount to be paid by respondent to compensate appellant for her expenses incurred for attorneys in this litigation in addition to the sums theretofore awarded to her for that purpose, to $150. That is the first subject treated in the argument for appellant, indicating that it is considered one of the most important matters upon the appeal. It is suggested that the allowance for attorney's fees should be measured upon the theory that the award of property is not to be diminished at

all by expenses of the litigation, and *Clarke v. Burke,* 65 Wis. 359, 27 N. W. 22, is cited. We find nothing of that kind there suggested. On the contrary it is suggested in the opinion that whether to allow the wife for attorney's fees and in the event of an allowance what sum to allow is a matter resting in the sound discretion of the trial court under sec. 2361, Stats. 1898; that it is competent for such court to make the husband pay all or a part of the wife's expenses in the litigation or not any of them, according to circumstances. That is undoubtedly the true rule. The conclusion reached by the trial judge in such a matter, except in case of clear abuse of judicial discretion, is beyond the reach of this court. There plainly was no such abuse here. The case was by no means complicated. The amount of property incidentally involved was not large. While the amount of labor performed by the learned counsel for appellant seems to have been quite large, the amount of necessary labor was not unusual for such a case. There were repeated motions in the case for temporary alimony, for attorney's fees, and for money to pay the expenses of the litigation, and other motions and proceedings. Some of the applications were granted and many denied, indicating that in the judgment of the trial judge, which certainly has support, there was a disposition on the side of appellant to make the litigation unnecessarily burdensome to respondent. The case at many points shows that he was pursued with rather excessive labor, with the net result, among other things, that out of an annual income of about $1,000, or $2,000 in the whole during the time intervening between the commencement of the action and the entry of the decree, he was compelled to pay for appellant's support, and for her expenses of various kinds in the litigation, some $1,150, leaving but about $800 for his own support and expenses. On the whole, we should say that the additional allowance of $150 and taxable costs, amounting to $254.82, was quite liberal to appellant.

The above words "excessive labor," we do not desire should be read as indicating more than a high degree of fidelity of attorney to client that should not count in the whole in determining how much of the latter's expense respondent should pay. Such fidelity may in any case, as it probably did here, result from commendable ambition to serve the client,—in harmony, however, with the idea that it should not all count in an equitable adjustment of the portion of such client's expenses the opposite party should pay.

The final conclusion reached is that this judgment must be affirmed as one awarding appellant a portion of respondent's estate in lieu of alimony, without costs to either party except that respondent must pay the clerk's fees.

Appeals to this court in cases where the respondent may be required to pay the costs of both parties regardless of whether appellant prevails or not, should not be encouraged by awarding costs regardless of the merits of the appeal. Where there is no question of sufficient doubt to warrant presenting it here, looking at the matter from the standpoint of that sound judgment and fairness which should always be exercised by attorneys in such a situation in determining whether to appeal to this court or not, the respondent, upon prevailing, should not be required to pay any considerable amount of costs in excess of such sums, at least, as may have been awarded prior to the final conclusion of the case. We do not find sufficient merit in this appeal to move us to look very favorably upon the decision to bring the case here. In that view, and in view of the fact that appellant has already been allowed in this court the sum of $125 as expenses, respondent should not be required to pay further costs other than clerk's fees.

*By the Court.*—The judgment of the circuit court is affirmed as one awarding property to the divorced wife in lieu of alimony, no costs to be allowed to either party except that respondent is to pay the clerk's fees.

VAN BECK, Respondent, vs. MILBRATH and another, imp., Appellant.

*April 21—May 8, 1903.*

*Mortgages: Reformation of instruments: Failure to read: Acquiescence: Laches.*

1. Where the facts and circumstances of the execution and delivery of a note and mortgage show that the mortgagee, in accepting a note and mortgage signed by one defendant only, believing all the defendants had signed, had neglected to examine the papers or have his agent read them, although nothing transpired to interfere with either acquiring full knowledge of their contents, such failure to exercise ordinary care and prudence to obtain knowledge of the contents of the instruments, will not justify a finding of the trial court that defendants were guilty of a fraud, or warrant a reformation thereof.
2. In such case, plaintiff discovered, soon after receiving the papers, that they were not signed by all the defendants as he supposed, and not only neglected to take the necessary steps to repudiate the transaction, but retained the note and mortgage and collected interest for several years without any intimation that he did not intend to accept the instrument in that form. *Held*, that he thereby elected to abide by and affirm the transaction, as embodied in the note and mortgage in the form delivered to him.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This action is brought by the plaintiff to reform a note and mortgage executed by the defendant F. J. Holtz to plaintiff on October 4, 1897, to secure the payment of $3,500. The material facts involved in this appeal are as follows: Plaintiff owned property in Estes' subdivision and in Van Beck's subdivision in the city of Milwaukee, incumbered by a mortgage of $600. The defendants *C. W. Milbrath* and *W. C.* and F. J. Holtz were the owners under a land contract of twenty acres located in the town of Lake, near Milwaukee, on which there was an unpaid balance of $4,600, due July 19,

1897. Plaintiff and said three defendants agreed to trade properties upon the following conditions: The defendants *Milbrath* and *W. C.* and F. J. Holtz were to convey to plaintiff their right under the land contract, he agreeing to assume the indebtedness of $4,600, with interest, and in consideration thereof to convey to those defendants the property in both the Estes and Van Beck subdivisions subject to the $600 mortgage. These defendants were to execute and deliver to plaintiff a note for $3,500, with interest, in part consideration for their exchange of properties, secured by a mortgage on all the lots in Estes' subdivision. The defendants *Milbrath* and *W. C.* and F. J. Holtz caused a deed to be prepared conveying plaintiff's property to F. J. Holtz. This was not understood by plaintiff, who executed the deed without reading it, believing the conveyance was to the three defendants jointly. The defendants also caused to be drawn and executed by F. J. Holtz a promissory note of $3,500, and a mortgage covering the land in Estes' subdivision, securing the payment of said note. The note and mortgage ran to plaintiff, who was not apprised of the fact that defendants *Milbrath* and *W. C. Holtz* were not named therein as makers with F. J. Holtz. One Thomas A. Hanson acted as agent in negotiating the trade between the parties, and plaintiff relied on him to act in his interest, believing that he was acting solely for him. Hanson in fact acted for both parties, and received a commission from defendants. Plaintiff did not read the deed or note and mortgage, nor request Hanson to inspect and read the same to or for him. He learned the contents thereof shortly after the deed and mortgage had been recorded on October 6, 1897. The note and mortgage are now the property of the plaintiff, and are due, with interest thereon from April 4, 1900. F. J. Holtz, the mortgagor, is insolvent. The defendants defaulted in the payment of taxes on the mortgaged premises for the years 1897 to 1901, inclusive. After learning that *Milbrath* and *W. C. Holtz* were

not included as parties to the written instruments, it appears from plaintiff's evidence that he and defendants had an interview on the subject, and that he relied upon their assurance that everything would be all right, and the note would be paid. The court decreed a reformation of the note and mortgage to embrace defendants *Milbrath* and *W. C. Holtz* as parties thereto, and holding them personally liable for the indebtedness evidenced thereby.

*Julius E. Roehr,* for the appellant.

For the respondent there was a brief by *Toohey & Gilmore,* and oral argument by *J. L. Gilmore.*

SIEBECKER, J. This action was brought to foreclose a mortgage upon real estate. The complaint charges that plaintiff became the holder and owner of the note and mortgage in question pursuant to an exchange of properties between himself and defendants *Milbrath* and *W. C.* and F. J. Holtz, on October 4, 1897. It is further alleged that he was defrauded in this transaction by defendants, who induced him to take this note and mortgage executed by defendant F. J. Holtz in place of a note and mortgage executed by the three defendants jointly, and that they fraudulently omitted from the mortgage several parcels of real estate which it had been agreed should be included. He demands that the note and mortgage be reformed to cover all the real estate specified in the complaint, and that the defendants *Milbrath* and *W. C. Holtz* be made parties thereto, and a foreclosure of the mortgage as reformed be decreed. The court found that the charges made in the complaint were substantiated by the evidence, except that the real estate described in the mortgage covered all the property which the parties had agreed to include therein. The defendants challenge the findings upon the evidence as to all of the charges of fraud and the conclusion of law deemed applicable to the facts found in the case. This state of facts presents two questions: (1) Was the plaintiff bound by his acceptance of the note and mortgage

upon the facts and circumstances under which he received them, without knowing by whom the instruments were actually executed? And (2) how are his rights affected by his subsequent conduct in retaining the same for some four years, collecting interest thereon, after knowing by whom they were actually executed, without complaint of any fraudulent conduct by the defendants and without repudiation of the transaction?

1. It appeared upon the trial that plaintiff and Hanson had ready means of knowing the contents of these instruments by simple inspection thereof before and at the time they were delivered. Plaintiff's means of knowledge concerning the transaction complained of, and whether he or Hanson, by the exercise of ordinary care and prudence, ought to have known the contents of these instruments, are controlling facts in the case.

"The law requires men in their dealings with each other to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not close their eyes to the means of information which are accessible to them." *Mamlock v. Fairbanks,* 46 Wis. 415, 1 N. W. 167; *Dowagiac Mfg. Co. v. Schroeder,* 108 Wis. 109, 84 N. W. 14; *Bostwick v. Mut. Life Ins. Co.* 116 Wis. 392, 92 N. W. 246.

The facts and circumstances of this transaction show that the plaintiff made no effort to read the note and mortgage before accepting them, nor did he request Hanson to do so for him, though nothing transpired to interfere with either in acquiring full knowledge of their contents. Such omission on their part casts a serious doubt upon the conclusion of fact found by the trial court that the defendants were in fact guilty of fraud as charged.

2. Further, is the plaintiff precluded from demanding relief in equity for the wrong he complains of in view of his conduct after he became fully possessed of the truth respecting the transaction? Was it not plainly his legal duty to take proper steps to rescind the contracts made, or to affirm

the transaction, and ask for their reformation, so that they would comply with the terms of the agreement upon the grounds now presented for relief? He not only refrained from repudiating the transaction, but accepted the benefits thereof, collecting interest as it became due, and treating it as a binding agreement in various ways in his dealings with the parties for a period of some four years, without any intimation that he did not intend to accept both note and mortgage as they were written. The clear inference from his conduct is that he accepted the note and mortgage and elected to abide the agreement just as therein stated, leading the parties to believe that he acquiesced in the entire transaction expressed by the written instruments.

"Acquiescence in the wrongful conduct of another, by which one's rights are invaded, may often operate, upon the principles of and in analogy to estoppel, to preclude an injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. . . . The same rule applies, and for the same reasons, to a party seeking purely equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction, and the like. Upon obtaining knowledge of the facts he should commence the proceedings for relief as soon as reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief." Pom. Eq. Jur. § 817.

The plaintiff neglected to take the necessary steps to enforce relief, and must be held in law to have elected to abide by and affirm the transaction as embodied in the note and mortgage in the form delivered to him. *Rogers v. Van Nortwick,* 87 Wis. 414, 58 N. W. 757; *Bostwick v. Mut. L. Ins. Co. supra.* For these reasons the judgment must be reversed.

*By the Court.*—That part of the judgment entered against the appellants *Charles W. Milbrath* and *W. C. Holtz* is reversed, and cause remanded, with directions to dismiss the complaint as to them.

PAUTZ, Respondent, vs. PLANKINTON PACKING COMPANY, Appellant.

*April 21—May 8, 1903.*

***Master and servant: Negligence: Personal injuries: Proximate cause: Special verdict: Inconsistent findings: Assumption of risk: Contributory negligence.***

1. **A machine for lifting animals in a packing house was so operated that, on applying power to a wooden wheel and, with a lever, pressing the wooden wheel against an iron wheel, it caused the iron wheel to revolve and operate the hoist. There was evidence that the wooden wheel was much worn, and had a piece broken out of it so that when brought in contact with the iron wheel it revolved in an uneven and jarring manner, causing excessive strain which cracked the iron wheel. While raising a heavy animal the iron wheel broke and injured the employee. *Held*, that the defective condition of the wooden wheel was the proximate cause of the injury, and a finding to that effect in a special verdict is inconsistent with a separate finding, that the defective condition of the iron wheel was also the proximate cause.**
2. **Plaintiff, who had worked in the same business five years, and for a month previous to the injury had known the wooden wheel was defective and out of order, necessarily assumed the risk, and was guilty of contributory negligence.**



APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

This is an action for personal injuries sustained by the plaintiff while in the employ of the defendant, as alleged in the complaint, in its packing house, in what was known as the "Beef Department," in slaughtering cattle. That the animal to be slaughtered was first raised by means of a lifting apparatus, consisting partly of friction wheels; one being a large cast-iron wheel, with a groove in the middle of the outer circumference, and a flange extending from it. That the other was a wooden wheel connected with a lever and with power-giving machinery. That by operating the lever the wooden wheel, while revolving and in operation, was brought

in contact with its circumference, with the groove between the flange and the iron wheel, causing the iron wheel to revolve and operate. That February 13, 1899, the iron wheel was, and for a long time prior thereto had been, defectively constructed, and was in a defective condition. That the iron wheel was not true. That the groove did not afford an even and equal resistance when operated upon by the wooden wheel. That the iron wheel had a crack or crevice extending from the outer edge of the flanges for a distance of from one and one half to two inches downward. That the wooden wheel at the date named, and for a long time prior thereto, was also defective, in that a large piece thereof was broken therefrom. That the outer surface of the circumference thereof was uneven and worn so its operation in contact with the iron wheel—producing friction necessary for the operation of the apparatus—it operated in an uneven and jarring manner. That such defects in the two wheels when in operation caused an unusual, unnecessary, and excessive strain upon the iron wheel. That on the day named a large beef had been raised by means of said apparatus, and had been slaughtered, and was being lowered by means of such apparatus, when the iron wheel suddenly burst, causing a piece to be hurled with great violence against the head of the plaintiff, cracking his skull and injuring his brain and otherwise. That the iron wheel had been worn out by long usage. That both wheels were out of repair in the respects mentioned, and that by reason of the fact that the wooden wheel was broken and defective as stated, and by reason of the worn-out condition of said wheels, and the unusual, unnecessary, and excessive strain upon such wheels by reason of the defective condition thereof, the iron wheel was caused to be broken, as stated, with the results mentioned. That such defects were at the time mentioned, and for a long time prior thereto had been, within the knowledge of the defendant, but not within the

knowledge of the plaintiff, and could not have been discovered by him with the exercise of ordinary care.

The answer consists of admissions, denials, and counter allegations. It appears that the wooden wheel was about eighteen inches in diameter, and the iron wheel about five feet in diameter, and the groove in it about three and one half inches deep, and V-shaped. The wooden wheel was in constant revolution. When it was pressed against the iron wheel by means of the lever, the iron wheel was thereby made to revolve, and, by so doing, wound up a rope upon a drum attached to the iron wheel. This rope, on being attached to the beef and wound up on the drum, raised the beef; and when the beef reached the right height a brake was set to hold the iron wheel, and the lever was released, and that removed the wooden wheel from the iron one, so that the wheels were no longer in contact, but some inches apart. When the beef was to be lowered, the brake was loosened, and the weight of the beef caused the iron wheel to revolve in the opposite direction, and the rope to unwind from the drum.

At the close of the trial the jury returned a special verdict to the effect (1, by consent of counsel) that the plaintiff was injured February 11, 1899, in the slaughtering room of the beef department of the defendant's establishment, by being struck on the head by a piece of an iron hoisting wheel at the west hoist in said room; (2) that said iron wheel was defective or out of repair immediately before the plaintiff was injured; (3) and the defendant knew of such defect or want of repair, or, in the exercise of ordinary care, ought to have known of the same, in time to have remedied the same prior to the plaintiff's injury; (4) that such defect or want of repair was the proximate cause of the plaintiff's injury; (5) that the wooden friction wheel of said hoisting apparatus was defective or out of repair immediately before the plaintiff was so injured; (6) and the defendant knew of such defect,

or ought, in the exercise of ordinary care, to have discovered such defect, in time to have remedied the same prior to the plaintiff's injury; (7) that such defect in said wooden wheel was the proximate cause of the plaintiff's injury; (8) that the defendant did not exercise ordinary care in the inspection of said west hoisting apparatus immediately before the plaintiff was injured; (9) that the plaintiff was not guilty of any want of ordinary care which proximately caused or contributed to his injury; (10) that $2,000 would compensate the plaintiff for such damage as he sustained by reason of his injury. Thereupon judgment was entered upon such verdict in favor of the plaintiff for the amount stated and costs. From that judgment the defendant brings this appeal.

*Joseph B. Doe,* for the appellant.

*Edgar L. Wood,* for the respondent.

CASSODAY, C. J. The result of three of the findings of the jury mentioned in the foregoing statement is that the iron wheel was defective, that the defendant knew or ought to have known of the defect, and that such defect was the proximate cause of the plaintiff's injury. The result of three of the other findings of the jury is that the wooden wheel was defective, that the defendant knew or ought to have known of the defect, and that such defect was the proximate cause of the plaintiff's injury. The defendant moved to set aside the verdict and grant a new trial on the ground, among others, that such findings were inconsistent and contrary to the evidence. The trial court apparently held that the verdict should stand, because it found two proximate causes of the injury. Counsel for the plaintiff contends that, "where two causes proximately contribute to produce a result, they are *concurrent,* and the person responsible for either cause is liable in damages." Among the adjudications cited in support of the proposition are *Houfe v. Fulton,* 29 Wis. 296; *Walrod v. Webster Co.* 110 Iowa, 349, 81 N. W. 598; *Thomp-*

*son v. L. & N. R. Co.* 91 Ala. 496, 8 South. 406; *Consolidated I. M. Co. v. Keifer,* 134 Ill. 481, 25 N. E. 799; *Herr v. Lebanon,* 149 Pa. St. 222, 24 Atl. 207. In this last case it was held:

"If two distinct causes are operating at the same time to produce a given result, which might be produced by either, they are concurrent causes. But if two distinct causes are successive and unrelated in their operation, one of them must be the proximate, and the other the remote, cause. In such case the law regards the proximate as the efficient and responsible cause, and disregards the remote cause."

Thus it has been held:

"When two causes co-operate to produce the damage resulting from a legal injury, the proximate cause is the originating and efficient cause, which sets the other cause in motion." *Lapleine v. M. L. & T. R. & S. Co.* 40 La. Ann. 661, 4 South. 875.

This court has repeatedly held:

"Neither time nor distance is an essential element of proximate cause, but it may be defined as the efficient cause—that which acts first, and, either immediately or through other causes set in motion by it, produces the result." *Deisenrieter v. Kraus-M. M. Co.* 97 Wis. 279, 72 N. W. 735; *Wills v. Ashland L. P. & St. R. Co.* 108 Wis. 255, 261, 84 N. W. 998. See, also, *McFarlane v. Sullivan,* 99 Wis. 361, 74 N. W. 559, 75 N. W. 71; *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 489; *Id.,* 23 Wis. 43.

In the case at bar it is undisputed, that the hoisting machine in question was operated by means of power being applied to the wooden wheel, which was kept in constant revolution. The iron wheel was made to revolve by means of the wooden wheel being pressed against it, as indicated in the foregoing statement. It is alleged in the complaint, and there is evidence tending to prove, that at the time of the injury, and for a long time prior thereto, the wooden wheel was "defective, in that a large piece thereof was broken therefrom, and that the outer surface of the circumference was uneven

and worn so that in its operation, and especially when in contact with said iron wheel aforesaid, producing the friction necessary for the operation of said apparatus, it operated in an uneven and jarring manner, and that such defects in said wooden and iron wheels, when such wheel or wheels were in operation, caused an unusual, unnecessary, and excessive strain upon said iron wheel," and "that by reason of the fact that the said wooden wheel was broken and defective as above stated and by reason of the worn-out condition of said wheels, and the unusual and unnecessary and excessive strain upon such wheels, . . . said iron wheel was caused to be broken as aforesaid, with the results aforesaid." If such were the facts then there would seem to be no escape from the conclusion that the defect in the wooden wheel was the proximate cause of the plaintiff's injury. If such were the facts, then it was the defect in the wooden wheel which acted first, and set in motion the iron wheel, and first caused the crack and then the break in that wheel. The jury found that the defect in the wooden wheel was the proximate cause of the plaintiff's injury. That finding is inconsistent with the finding that the defect in the iron wheel was the proximate cause of the injury. Besides, the plaintiff testified to the effect that he "noticed the thumping that [the witness] Webber talked about" while he "was working at the hoister;" that he "knew it was the friction—it was worn out;" that he "did not know there was a piece out of the wooden wheel;" that he "had no business to try to find out what was the matter with it;" that he did not tell Harrison, the mechanical engineer, that "it was thumping and not working right;" that he did tell Schubert (who was engaged in oiling the hoisting apparatus) "about it about a month before the accident;" that he asked him why he did not "fix that hoist;" that the men had trouble and could not get the bullock up; that "it took two men at the lever to pull the bullock up;" that "Schubert said they would like to fix it" for him, but that "they did

not have the wood to do it;" that "the thumping went on after that for a month." If the defect in the wooden wheel was the proximate cause of the injury, then, with such knowledge on the part of the plaintiff of such proximate cause, it is difficult to perceive on what theory the jury could have found that the plaintiff was not guilty of any want of ordinary care which proximately caused or contributed to his injury. The plaintiff had worked for the defendant in the business for five years prior to the injury. He must be regarded as a man of ordinary intelligence and unterstanding. If the defect in the wooden wheel was the proximate cause of his injury, and he knew of such defect for a month prior thereto, then he necessarily assumed the risk, and was guilty of contributory negligence. We must hold that there was a mistrial in this case.

*By the Court.*—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

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QUIN, Appellant, vs. HAVENOR and another, Respondents.

*April 22—May 8, 1903.*

***Injunction: Corporations: Issue of stock: Pleading: Sufficiency of allegations.***

1. A temporary injunction, restraining the officers of a corporation from selling and issuing shares of stock to a third person, will not be granted on the application of a stockholder claiming to be entitled to additional shares, where there is ample unissued stock out of which the shares claimed by plaintiff, as well as those proposed to be sold, may be issued.
2. A complaint alleging "that the plaintiff has good reason to fear and does fear" the directors of a corporation will sell or incumber its assets, without any averment that they have threatened or do threaten to do so, does not warrant a temporary injunction to prevent such acts.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal from an order dissolving a temporary injunctional order. The plaintiff's complaint (which was alleged to have been filed on behalf of himself and all other stockholders similarly situated) showed, in substance, that the plaintiff and the defendant *Havenor,* in January, 1901, organized a domestic corporation for the purpose of engaging in the business of playing professional baseball at Milwaukee as a member of the American Association of Baseball Clubs, which corporation had an authorized capital of $30,000, divided into thirty shares of $1,000 each; that the plaintiff subscribed and paid for seven and one half shares of such capital stock, and that defendant *Havenor* subscribed for six and one half shares, and *Bauman* for one share, and that *Havenor* paid for his own stock, and also for the share subscribed by *Bauman;* that all of the parties became directors of the corporation, and that the plaintiff was elected president thereof, and the defendant *Havenor* was elected secretary and treasurer; that at a meeting of the stockholders held January 22, 1902, a resolution was passed authorizing and directing the issuance of the remaining fifteen shares of stock in said corporation, one half thereof to the plaintiff and one half thereof to the defendant *Havenor,* in consideration of the assignment by them to the corporation of a membership in the American Association aforesaid, which entitled its owners to play baseball at the city of Milwaukee in competition with the other members of said association; that the last meeting of the directors of said association was held January 31, 1902, and was adjourned subject to the call of the president; that no other meeting of said directors has been called by the president, but that the defendants *Havenor* and *Bauman* held a pretended meeting of said directors September 19, 1902, and pretended to pass a fraudulent resolu-

tion directing the sale of $2,000 worth of the capital stock of said corporation to a third person, and also offering all of the remaining stock of said corporation for sale, when in fact the whole amount of the stock of said corporation had been subscribed and sold; that said directors' meeting was fraudulent and void because not properly called, and that the said resolution offering stock for sale was also void, and made for the purpose of defeating the plaintiff's legal rights; that the assets of said corporation consist of a lease for ten years of a ball park in the city of Milwaukee, and the said American Association franchise, and that the plaintiff has good reason to fear and does fear that the defendant will sell said lease and franchise to innocent third persons, unless enjoined therefrom; that the defendants fraudulently refuse to issue to the plaintiff the seven and one half shares of stock so belonging to him in payment of his share in said franchise, and that they threaten to sell the same to innocent third persons, in fraud of the plaintiff's rights. To this complaint there was attached as an exhibit a copy of the alleged fraudulent resolution offering stock for sale, by which it appears that said resolution simply authorized the sale of $2,000 worth of stock in addition to the $15,000 worth first sold, and no more. Upon this complaint a temporary injunctional order was obtained restraining the defendants from selling and issuing any additional stock, and from selling or incumbering its lease or franchise. The defendants answered fully on the merits, denying all allegations of fraud, and also denying that any resolution was ever adopted authorizing the issuance of stock in payment for the said franchise, and alleging that the directors' meeting of September 19, 1902, was duly called and held, and that the resolution attached to the complaint was legally adopted at their meeting. The answer contains other allegations not necessary to be inserted. Upon this answer and upon supporting affidavits, as well as upon the

examination of the plaintiff, taken under sec. 4096, Stats. 1898, the defendants moved to dissolve the temporary injunctional order, and said motion was granted.

For the appellant there was a brief by *Bohmrich & Maher,* and oral argument by *J. J. Maher.*

For the respondents there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

WINSLOW, J. It is a little difficult to understand how this action can be brought on behalf of "other stockholders similarly situated" when it appears on the face of the complaint that there are only three stockholders of the corporation, one of whom is the plaintiff, and the remaining two are defendants in the action, but, as this question does not necessarily arise upon this appeal, we will spend no time in endeavoring to solve it. It is sufficient to say that, treating the action simply as an action brought to vindicate the rights of the plaintiff individually, the complaint itself shows that no temporary injunctional order is necessary. It appears from the complaint that only fifteen out of thirty of the authorized shares of the stock have been issued, and that the only action taken by the directors was a resolution to offer for sale two more shares of stock, which would still leave thirteen shares of stock unissued. The plaintiff claims to be entitled to receive seven and one half shares in addition to his present holding. If he is successful in his claim, there will be ample stock out of which this amount may be issued, even if the two shares proposed to be sold by the directors be issued and sold. So the issuance and sale of the two shares will not prejudice his rights. As there are no allegations in the complaint showing that the defendants have threatened or do threaten to sell or incumber the lease or the franchise, there are no grounds for granting an injunctional order to prevent these acts.

*By the Court.*—Order affirmed.

HEER, Administratrix, Respondent, vs. WARREN-SCHARF ASPHALT PAVING COMPANY, Appellant.

*April 22—May 8, 1903.*

*Negligence: Steam roller: Operation so as to frighten horses: Personal injuries: Contributory negligence: Evidence: Measure of damages: Instructions to jury: Material error.*

1. Where a steam roller, at the time plaintiff attempted to pass, had ceased operation, and was standing stationary, outside the limits of the driveway of a street, it cannot be said to be negligence, in law, to attempt to drive past it.
2. Where a steam roller, standing stationary outside the limits of the driveway of a street, is started from its condition of rest and quietude into motion at the moment a passing horse is slightly in front of the roller, such action warrants a finding by the jury that it was calculated to frighten even a gentle horse, and, under the duty which rests upon all men to so conduct themselves as not to place others in serious peril, that it was negligence so to do.
3. In such case, it is not error to refuse to hold, as matter of law, either that plaintiff was guilty of contributory negligence, or that defendant was free from negligence.
4. In an action for negligence resulting in personal injuries, it appeared, as descriptive of the physical and mental labor which plaintiff had been able to perform prior to his injury, that he conducted a grocery business alone, but for trifling assistance from a boy, doing the buying, selling, etc., working twelve to fourteen hours per day. Plaintiff then proceeded to describe the character and magnitude of the business—specifying the articles dealt in, the manner of their purchase—and, having no books, testified that the average stock carried was about $2,000, the average annual sales about $7,000, and the average net profits about twenty per cent. of the sales, or $1,500. The court instructed the jury that the plaintiff could recover in addition to the usual items of expense of treatment, past and future suffering, etc., "the loss of earnings of the plaintiff which he has already suffered, and which you are reasonably certain he will suffer in the future." Such instruction was conceded to be a correct abstract statement of the law. *Held*, that if further instructions were necessary or proper to guard against misapprehension by the jury of the effect of the evidence above mentioned, appellant should have

made request therefor, without which no error could be assigned upon their absence.

5. In an action for negligence resulting in personal injuries, evidence may be given to show fully the capacity of plaintiff to labor before the injury, and if his work consisted in the management of a business, the character and magnitude thereof, not that the jury is to allow any loss of such profits as damages, but to consider them, with other elements, as descriptive of the amount and grade of the services of which plaintiff was capable.

6. In an action for negligence whereby plaintiff's horse was caused to run away, error—urged for the first time on appeal—cannot be assigned upon the admission of testimony that plaintiff's horse was gentle, on the ground that witness did not establish that it was the same horse, where the witness testified it was a horse owned by plaintiff in 1898, and plaintiff testified that the horse which ran away was one owned by him for a year prior to October, 1898. Any doubt on that subject could have been cleared up on the trial had defendant suggested it by objection.

7. Plaintiff, a groceryman forty-five years of age, received injuries involving great suffering for several months, and which left him a hopeless cripple, condemned to crutches for life. *Held*, that a verdict of $8,000 was not excessive.

MARSHALL, J., dissenting, is of the opinion:

(a) The rule, that on appeal error is not presumed, goes only to prevent consideration of matters not appearing upon the record, not in minimizing error which does appear.

(b) Error appearing on the record is presumed to have been prejudicial unless the contrary appears beyond reasonable probability.

(c) Where evidence is improperly admitted, the party duly objecting and excepting may stand upon his rights without further action. He is not called upon to request instructions which will render such evidence harmless or be held to have waived the error.

(d) An instruction good as an abstract statement of a legal principle, applicable to a case, does not render improper evidence harmless so long as such evidence may, within reasonable probabilities, have been viewed prejudicially.

(e) The rule that lost past profits to a person, as to his business conducted by a combination of his personal services or other labor and capital, by a partial or total suspension of such business, measuring such profits by some reasonable,

**definite standard, such as profits realized in the same business before it was wrongfully interfered with, are recoverable of another causing such suspension,—does not apply to consequential damages caused to a person engaged in such business by reason of his being wrongfully injured so as to be partially or totally disabled from attending to the same as usual, either as an independent element of damage, or as a basis for determining loss sustained by such person being injured in his earning power.**

**(f) Profits of a business enterprise, combining capital and labor, do not in any case constitute a legitimate basis for estimating the earning power of one personally contributing the element of labor, in case of his being wrongfully injured so as to be unable as usual to furnish such element.**

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action for personal injuries suffered as the result of the runaway of the horse of plaintiff's decedent, Damian Heer, who was the original plaintiff, and died after judgment. He will hereinafter be referred to as plaintiff. The runaway is claimed to have been caused by the negligence of defendant's employee in suddenly starting its steam roller into operation as the plaintiff was driving past it. The evidence tended to disclose that Grand avenue, in Milwaukee, between Ninth and Tenth streets, is a double street, having a driveway of some thirty-five feet on each side, and between the two a park or boulevard of thirty or forty feet in width. Where Tenth street crosses this boulevard, there is at the intersection a soldiers' monument. As plaintiff was driving westward on the north driveway, and some seventy feet before he reached Tenth street, the defendant's steam roller, which during the day had been at work on Tenth street, orth of Grand avenue, was run southerly across the driveway, into the space by the monument, and stopped. As it went across, it disturbed a team ahead of the plaintiff, and he stopped and waited until it had become stationary in this space; it having been run in there, not in the course of rolling the street, but to wait for the rest of the paving gang. After it had stopped, and the

other team had passed on, plaintiff proceeded to drive past it. Just as he got opposite the roller—the horse's head, and perhaps body, past it—it started northward toward him. His horse became frightened and shied, but he was able to pull it back into the street, but the roller continued its northward movement toward him, whereupon the horse bolted, became wholly unmanageable, and ran a block to the intersection of Eleventh street, where the wagon was overturned and the plaintiff injured. The jury found, by a special verdict: (1) The injury; (2) the horse was of ordinary gentleness; (3) the steam roller, while standing still, was not calculated to frighten such a horse; (5) the roller, when operated, was naturally calculated to frighten such horse when in such proximity; (6) such likelihood ought to have been known to a person of ordinary intelligence; (7) the roller did frighten plaintiff's horse; (8) which by reason of such fright got beyond control and ran away; (9) such control was not regained; (10) the steam roller was not stationary when the horse was frightened; (11) it had been stationary just before the plaintiff attempted to cross the intersection of Tenth street; (12) it started up while plaintiff was crossing that intersection; (13) the horse was frightened by such starting up; (14) the employee in charge was negligent in so starting up; (15) such negligence was the proximate cause of the injury; (16) plaintiff was guilty of no want of ordinary care contributing to the injury; (17) damages, $13,500. Defendant moved for nonsuit and for direction of a verdict at the close of all the evidence, and before judgment moved to set aside the special verdict and grant a new trial. All of said motions were denied, except that the plaintiff was required to remit $5,500 from the verdict, which he did, whereupon judgment was entered for $8,000 damages, and costs, from which the defendant appeals.

For the appellant there was a brief by *Quarles, Spence & Quarles,* and oral argument by *W. C. Quarles.*

For the respondent there was a brief by *Adolph G. Schwefel* and *Joseph B. Doe,* attorneys, and *Hoyt, Doe, Umbreit & Olwell,* of counsel, and oral argument by *Mr. Doe.*

DODGE, J. The first assignment of error argued is upon the refusal of the court to hold, upon one or other of defendant's motions, that the evidence conclusively established contributory negligence in the plaintiff, and acquitted the defendant of negligence. Much of the discussion and citation of authority is addressed to situations or conduct which possibly the evidence tended to establish, but which are negatived by the verdict of the jury upon conflicting evidence. We have no doubt that, while certain of the specific findings are controverted by the appellant, the verdict thereon is sustained by the evidence, namely, that the roller was not in course of operation in rolling the street at the time that the plaintiff sought to pass it, but had ceased such work, and was standing stationary outside of the limits of the driveway; that while so standing it was not negligence, in law, to attempt to drive past it; and that (what is specially controverted) the machine was started from a condition of rest and quietude into motion at the moment most likely to frighten a horse near it, namely, when it was slightly behind him. From these facts we are constrained to hold that it cannot be said, as matter of law, that it was not negligent to unexpectedly start such an appliance when a passing horse was within thirty or forty feet of it; and this, too, without at all controverting the proposition that the use of such a roller upon the streets of a city is lawful, and that one who approaches it while in its ordinary employment of being moved back and forth would be presumed to accept the peril of his horse being frightened thereby. We are persuaded that the jury were not trespassing beyond the bounds of reasonable judgment in declaring that the sudden transmutation of such an appliance from stillness and silence into an approach toward a horse, with

the necessary accompaniment of noise and escaping steam, was calculated to frighten even a gentle horse, and that, under the duty which rests upon all men to so conduct themselves as not to place others in serious peril, it was negligence to cause this transmutation. We therefore reach the conclusion that no error was committed by the trial court in refusing to hold, as matter of law, either that the plaintiff was guilty of contributory negligence, or that the defendant was free from negligence.

The most vigorously debated assignment of error is based upon the admission in evidence of the fact that the average annual profits of plaintiff's business for ten years before his injury had been about $1,500. The question is discussed by the appellant as if this fact had been proved and submitted to the jury as a measure of plaintiff's damages. He argues with much force and much authority that the net profits of a business involving capital include other items than the mere personal services of the owner, and that they are neither a safe nor a correct measure of the damage resulting to him from mere inability to render such services. 1 Sedgwick, Dam. § 181; 8 Am. & Eng. Ency. of Law (2d ed.) 654; *Chapman v. Kirby,* 49 Ill. 211; *Kinney v. Crocker,* 18 Wis. 74; *Ripon v. Bittel,* 30 Wis. 614, 618; *Luck v. Ripon,* 52 Wis. 196, 200, 8 N. W. 815; *Bierbach v. Goodyear R. Co.* 54 Wis. 208, 11 N. W. 514. This position may well be conceded, and we should have little doubt that submission to the jury of the profits of this business as the measure of either of plaintiff's earning capacity, or of his damages from personal disablement, would have been erroneous. Examination of the record, however, fails to establish such fact or situation. The plaintiff, as descriptive of the physical and mental labor which he had been able to perform prior to his injury, testified that he conducted this business alone, but for trifling assistance from a boy; doing the buying, selling, etc.; working twelve to fourteen hours per day. He then proceeded to de-

scribe the character and magnitude of the business—specifying the articles dealt in, the manner of their purchase—and, having no books, testified that the average stock carried was about $2,000, the average annual sales about $7,000, and the average net profits about twenty per cent. of the sales, or $1,500. The court instructed the jury that the plaintiff could recover in addition to the usual items of expense of treatment, past and future suffering, etc., "the loss of earnings of the plaintiff which he has already suffered, and which you are reasonably certain he will suffer in the future." This appellant concedes to be a correct abstract statement of the law. If further instructions were necessary or proper to guard against misapprehension by the jury of the effect of the evidence above mentioned, the appellant should have made request therefor, without which no error can be assigned upon their absence. The mere admission of the evidence is therefore the only debatable ground of complaint. The authorities—those cited by appellant as well as others—are substantially uniformly to the effect that, as a basis for the jury's estimation of damages, evidence may be given to show fully the capacity of plaintiff to labor before his injury, and, if his work consisted in the management of a business, the character and magnitude thereof. Sedgwick, Dam. §§ 180, 181; 8 Am. & Eng. Ency. of Law (2d ed.) 653, 654; *Phillips v. L. & S. W. R. Co.* L. R. 5 C. P. Div. 280; *Ehrgott v. New York,* 96 N. Y. 264, 275; *Thomas v. U. R. Co.* 18 App. Div. 185, 45 N. Y. Supp. 920; *Pennsylvania R. Co. v. Dale,* 76 Pa. St. 47; *Hanover R. Co. v. Coyle,* 55 Pa. St. 396; *Goodhart v. P. R. Co.* 177 Pa. St. 1, 16, 35 Atl. 191; *Wallace v. P. R. Co.* 195 Pa. St. 127, 45 Atl. 685; *Alabama G. S. R. Co. v. Yarbrough,* 83 Ala. 238, 3 South. 447; *Wallace v. W. N. C. R. Co.* 104 N. C. 442, 10 S. E. 552; *Rio Grande W. R. Co. v. Rubenstein,* 5 Colo. App. 121, 38 Pac. 76; *Ballou v. Farnum,* 11 Allen, 73; *Denver v. Sherret,* 88 Fed. 226; *Kinney v. Crocker,* 18 Wis. 74; *Ripon v. Bittel,* 30 Wis. 614; *Luck*

*v. Ripon,* 52 Wis. 196, 8 N. W. 815. Many of these cases go to the exact proposition that, in thus describing such business, it is competent to prove the magnitude of the profits therein—not that the jury is to allow any loss of such profits as damages, but to consider them, with other elements, as descriptive of the amount and grade of the services of which the injured man was capable. When that is ascertained, the jurymen are to apply their judgment and common knowledge in deciding what money-earning capacity results from the ability to render such services. This, of course, they may do without the aid of expert opinions. *Blair v. M. & P. du C. R. Co.* 20 Wis. 262, 264; *Luessen v. Oshkosh E. L. & P. Co.* 109 Wis. 94, 85 N. W. 124; *Meyer v. Mil. E. R. & L. Co.* 116 Wis. 336, 93 N. W. 6. When such money-earning capacity of the plaintiff, sound, is ascertained, the jury are then ready to ascertain the extent of its impairment by the injury. As we read the record, in light of the rule that all reasonable presumption must be indulged against error (*Edwards v. Smith,* 48 Wis. 254, 3 N. W. 758), we find nothing to justify the conclusion that the evidence went any further than is warranted by the rules above stated, namely, to prove the quality, character, and amount of personal service which plaintiff did perform before the accident; thus distinguishing the case at bar from *Bierbach v. Goodyear R. Co.* 54 Wis. 208, 11 N. W. 514. True, the court stated, in overruling an objection to the average past profits, and evidently in response to an argument of appellant's counsel, that such evidence was admitted subject to the rule that other proof must be brought in to make future profits a measure of damage. He may have then expected that a claim for loss of prospective profits as damages was going to be made, but none appears. Plaintiff made no attempt to prove that the business was less profitable during some months that it continued to run, nor that it might not have run with equal profit thereafter, had plaintiff not decided to sell out. Again, when the case was sub-

mitted to the jury, they were not authorized to allow any damage by reason of lost or diminished profits, but merely the loss of earnings of the plaintiff. They apparently did not adopt $1,500 per annum as a measure of his loss of earnings, for the $13,500 awarded would supply an annuity of only about $900 at plaintiff's age when injured. We conclude that no error affirmatively appears in the admission of this evidence.

These considerations render unnecessary any discussion of appellant's contention that the prospective profits were left by the evidence too uncertain and conjectural. Since, as said above, no such profits were allowed as damages, inadequacy in their proof is not material.

Error is assigned upon admission of testimony that plaintiff's horse was gentle, upon the ground—urged in this court for the first time—that the witness did not establish that it was the same horse. He said it was a horse owned by plaintiff in 1898. Plaintiff testified that the horse which ran away was the one owned by him for a year prior to October, 1898. This was obviously deemed by the court below to establish identity sufficiently to enable the witness to testify. Any doubt on that subject could have been momentarily cleared up, had appellant suggested it by his objection. The error is not well assigned.

We cannot say that the $8,000 damages as finally allowed are excessive. The plaintiff, when injured, was in his prime—forty-five years of age—with expectancy of life twenty and one half or twenty-four and one half years, according to different tables. His injuries involved great suffering for several months, and left him a hopeless cripple, condemned to crutches for life. The degree of such disablement was largely evidenced by his own appearance, of which jury and trial judge had advantage. The amount awarded, without deducting that allowed for expenses and suffering, would, at present rates, purchase an annuity of about $570.

We cannot say that this would greatly or at all exceed the impairment of his earning capacity, as the jury and trial judge might have believed it to be from the evidence before them.

*By the Court.*—Judgment affirmed.

MARSHALL, J. I concur in the decision except as to the assignment of error respecting the establishment of loss of business profits to enable the jury to determine the element of damages chargeable to diminished earning capacity. In my judgment such decision is contrary to the great weight of authority, contrary to the rule of this court as it has stood for about a quarter of a century and been one of the chief guides of courts and text-writers, and the conclusion was reached by unsound reasoning and a misconception of the authorities cited in support thereof. If I fail to demonstrate all that, my dissent will stand without the justification which I firmly believe it possesses.

At the outset my brethren concede that if the trial court had instructed the jury that lost business profits could be taken as the plaintiff's damages on account of diminished earning power, prejudicial error would have been committed. They say that all the court said to the jury in the instruction on that subject was that diminished earning power was one of the consequential elements of damages from the injury which plaintiff was entitled to be compensated for, which, as a statement of abstract law, was right. They suggest that if further instructions were desired to guard against the jury's adopting a wrong rule in view of the evidence, appellant's counsel should have requested the same, and that, failing to do so, it has no reason to complain. I confess utter ignorance of any such rule, applicable to the situation to which it was applied. True, an instruction, correct as a statement of abstract law, thought not as explicit as it might be, is deemed free from prejudicial error. It is often said that, if more definite instructions are needed by either party, he is deemed

to have waived the same by failing to make a request in that regard. But I think it needs no discussion to demonstrate that evidence so offered and received against objection as to establish a wrong rule of damages, is not rendered harmless by an instruction in respect thereto good in the abstract but not calculated to change the direction of the jurors' minds as to the wrong rule,—so change it as to remove any probability of its influencing the verdict. That is, an instruction good in the abstract will not cure error in the admission of evidence when not given so as to clearly have that effect. Again, a person menaced by improper evidence admitted, is never called upon after having taken proper exceptions to request an instruction which, if given, would ward off the danger, or be held to have waived the exception. To refer to the rule that an instruction good as far as it goes, based on authorities like *Weisenberg v. Appleton,* 26 Wis. 56, and *Nat. Bank of Merrill v. Illinois & W. L. Co.* 101 Wis. 247, 77 N. W. 185, cannot be deemed erroneous because not as clear as it might have been, to cure error in the admisssion of evidence, because, from the standpoint of the lawyer, the instruction is susceptible of a construction rendering such evidence harmless, we take it, is an entirely new application thereof. The true one is that evidence erroneously received is presumed to be prejudicial till the contrary appears, and that due exception to the ruling admitting it preserves the right to challenge such ruling upon appeal. This is elementary:

"The presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that error challenged did not prejudice and could not have prejudiced the complaining party, that the rule that error without prejudice is no ground for reversal, is applicable." *Deery v. Cray,* 5 Wall. 795, 808; *Smiths v. Shoemaker,* 17 Wall. 630, 639; *Moores v. N. Bank,* 104 U. S. 625, 630; *Mexia v. Oliver,* 148 U. S. 664, 673, 13 Sup. Ct. 754; *Boston & A. R. Co. v. O'Reilly,* 158 U. S. 334, 337, 15 Sup. Ct.

830; *Peck v. Heurich,* 167 U. S. 624, 630, 17 Sup. Ct. 927; *Choctaw, O. & G. R. Co. v. Tennessee,* 116 Fed. 23, 30.

The point above discussed we deem of great significance in the opinion of my brethren. I assume that, without the aid of the rule invoked that on appeal the presumption is against error, a different result would have been reached. To my mind such rule had no legitimate application whatever to the situation. I hope I do not misjudge the language of the court's opinion, or speak in respect thereto otherwise than with that respectful consideration due to the combined judgment and personal considerations and labor that produced it. However, I cannot do justice to myself without emphasizing my dissent from the doctrine that the rule of presumption against error can be legitimately applied as it was here. True, as my brethren say, "error must affirmatively appear" to be appreciated at all on appeal. They cite on that *Edwards v. Smith,* 48 Wis. 254, 3 N. W. 758, which is to the effect that error not appearing upon the face of the record cannot be inferred to exist. But pray where is the authority that error appearing upon the record is in any case presumed not to be prejudicial error till the contrary appears clearly; or the authority that an exception to improper evidence can be rendered unavailing by presumption, or anything short of a showing rendering harmful effect therefrom not within reasonable probabilities. The language of the federal court shows the unbending nature of the rule for which we contend. The rule of this court is the same. *Gibbons v. W. V. R. Co.* 62 Wis. 546, 22 N. W. 533; *Hopkins v. Rush River,* 70 Wis. 10, 34 N. W. 909, 35 N. W. 939; *West v. Wells,* 54 Wis. 525, 11 N. W. 677; *Small v. Champeny,* 102 Wis. 61, 68, 78 N. W. 407; *Buel v. State,* 104 Wis. 132, 80 N. W. 78.

It seems that the foregoing amply demonstrates that the process of reasoning adopted by my brethren, to support the conclusion that if the evidence in discussion was not in all respects proper the record does not show that the rulings upon

objections thereto were prejudicially wrong, will not bear the test of the authorities. Now we will endeavor to briefly show that the evidence was offered and received not only so as to be liable to lead the jury to regard the profits of the grocery business as a basis for measuring plaintiff's earning capacity, but that in all reasonable probability they did so regard it. All that is necessary on that branch of our discussion is to give a *verbatim* history of the proceedings bearing on the point. No comment upon it will be necessary.

When counsel for respondent in the course of the trial took up the task of proving the damages of plaintiff by diminished earning power, this is what occurred:

"Q. At the time of this accident about what were your earnings in your business?

"A. What do you mean, my net profits?

"Q. Yes, your net profits?

"A. My net profits was about $1,500 a year.

"Defendant's Counsel: I move to strike out the answer.

"Court: I shall let it stand for the present. I do not know what it may be followed by.

"Exception by the defendant.

"Witness: I haven't earned anything since the accident because I can't do anything,—ain't able to do anything.

"Q. This grocery business that you were running up in Galena street,—tell the jury what kind of a business it was and how you ran it; that is to say, whether you were hired as clerk, whether you were proprietor and had clerks, and what kind of a business you were running?

"Objected to as immaterial and irrelevant.

"Objection overruled. Exception.

"A. Well, I had a pretty fair business. I think I was doing about as good as the best ones on the West Side did.

"Defendant's counsel moved to strike out the answer as not responsive.

"The last portion was struck out; the other allowed to stand.

"Exception.

"Witness: I was not hired as a clerk. It was my own business. I hired help. I had one boy working for me, but

not at the time this happened. I had my own boy then, my son.

"Q. What was his age?

"A. Sixteen years old. I did a retail business. I had owned that business about fifteen years.

"Q. Say for ten years prior to October 4, 1898, what had been your average earnings in your business; net earnings?

"Objected to as irrelevant, incompetent and immaterial, and no proper foundation laid for the question.

"Objection overruled. Exception.

"Court: Of course it is always on the theory that plaintiff will bring in all the proof necessary in order to make loss of future profits a proper subject for damages.

"A. In the whole ten years you mean?

"Q. The average, taking the loss and gains, the average for ten years. What was it about?

"A. About $1,500 a year.

"Q. About what was the amount of your annual sales?

"A. (Under objection) Well, we didn't keep book over them only once in a while in the poorest season, when we had time enough to do that. Used to keep some times in a year for four or five or six weeks; keep up our sales, and then figure out our profits out of that. In a busy season we hardly got time to do that.

"Q. How many thousand dollars' worth a year of goods were you seling?

"A. I never kept time of that.

"Q. How can you tell what your profits were then?

"A. I can figure out the profits out of a week or two or three.

"Q. How much did you buy?

"A. I never kept time of that.

"Q. What was about the value of the stock you carried?

"A. (Under objection) About $2,000.

"Q. How often did you renew your stock?

"A. Well, as soon as we run out of one article we buy that over again.

"Q. What was the amount of your sales for the year preceding the accident?

"Objected to as irrelevant and immaterial and no proper foundation laid for the question.

"Objection overruled. Exception by defendant.

"Court: I shall allow this question if connected with other questions as to previous years.

"A. At the lowest figure I would figure it about $25 a day. That would make $150 a week. That would come in a year over $7,000.

"Q. About what were your sales for the year previous to the year of the accident?

"A. (Under objection) I think about the same.

"Q. You may state generally about how much was the total amount of your yearly sales for the ten years preceding the accident?

"A. (Under objection) Well, over $7,000 a year.

"Q. About what was your average percentage of profit?

"A. (Under objection) About twenty per cent. or probably a little over.

"Q. During say ten years prior to the accident did you keep in your store regular books of account?

"A. No, I did not.

"Q. Was the building you occupied as a store your own building?

"A. My own building.

"Court: Have you that building rented now?

"A. Yes.

"Court: What rent do you get for it?

"A. $30 a month.

"Court: That is for the building alone?

"A. For the building alone."

We have quoted substantially all the evidence produced bearing in any way directly on the subject of the plaintiff's loss as to diminished earning capacity by reason of his being unable to attend to his business as usual. It refers, it will be seen, to loss of business profits. Such loss was at the very outset of the examination put forward as the measure of diminished earning power. The witness said:

"The net earnings in my business was about $1,500 a year before I was injured; I haven't earned anything since the accident."

We submit confidently, if it were proper even to hold that error is not to be deemed prejudicial unless it seems reasonably certain or at least probable that prejudice was in fact effected thereby, that if the evidence detailed put before the jury an erroneous basis from which to compute diminished earning power, the error in that regard cannot be passed as harmless. When the true rule is applied that error which, within reasonable probabilities, operated harmfully, constitutes good cause for judicial redress, there can be no reasonable doubt, it seems, that appellant has clear ground for complaint. No one, as appears to us, can read the quoted proceedings without receiving at once the idea that net business profits, income from capital combined with personal work, was put before the jury as the plaintiff's earning capacity before he was injured, or at least as a basis for computing the same, leaving it to the jury to make proper deductions for interest on capital, use of building and horse, value of help and other matters. My brethren admit that the evidence had the latter effect, and we will endeavor to show that such admission is enough to condemn the result reached. How can it reasonably be said that the idea was taken from the minds of the jury that the lost profits were not of themselves the proper measure, by the mere use of the words in the instruction to the effect that plaintiff was entitled to recover for diminished earning capacity, nothing being said about loss of business profits? How can it be said that the language of the court did not probably lead the jury to understand, if they did not before, that loss of business profits was synonymous with loss of earning power. When one calls to mind how easy it is to fail to distinguish between business profits and personal earning power in a case like this, is it not plain that a layman would be quite likely to look upon the two as synonymous, especially since in no other way could lost business profits be recovered? How could it be said otherwise, when

even courts have been at times puzzled with the matter, as we shall hereafter show?

My brethren suggest, as evidence that the jury did not take the business profits testified to as a basis of earning power, that if they had the verdict would have been larger. Here, again, the process of reasoning by which the decision is supported is one with which I cannot agree. It fails to take notice of the fact that the jury must have understood that full earning capacity does not last to the end of the expectancy of life; that it diminishes with age; that it is subject to the contingency of sickness and many probable interferences. And, again, the evidence did not warrant the belief that the plaintiff's earning power was totally destroyed. Facing the situation, as the jury must have done, in a sensible disposition of the issue before them, we must see at once that the fact that they did not render a verdict on the basis of diminished earning power to the extent of plaintiff's business profits at the time he was injured, for the period of his expectancy of life, does not furnish even a well-grounded suspicion that such profits were not taken primarily as the measure of his earning power at the time he was injured.

We will now endeavor to show that the allowance of evidence of plaintiff's business profits as a basis for computing his damages, past and future, on account of diminished earning power, was plainly prejudicially improper, tested by decisions of this court.

The first case decided here, of importance in our discussion, which has been referred to as furnishing support for the decision of my brethren, is *Kinney v. Crocker,* 18 Wis. 74. The court there held that past profits lost in the business of operating a flour mill, consequent upon a personal injury to the proprietor, were recoverable. The idea of using past profits for estimating diminished future earning power is not in the case. The next case is *Blair v. M. & P. du C. R. Co.*

20 Wis. 262. That likewise related only to lost past profits. It is as foreign to the question now before us as the first case referred to. Next we have *Ripon v. Bittel,* 30 Wis. 614. That also relates to recovery of past loss for diminished earning power by relation to business profits. It, too, has no bearing on the case before us when rightly understood, though it will be seen by what will be said later that the case is out of harmony with the current of authority. The next is *Luck v. Ripon,* 52 Wis. 196, 8 N. W. 815. There profits, not of a commercial business, or any business combining labor and capital, but profits in the sense of avails of personal service, strictly so called, in the vocation of midwifery, were held proper to be considered on the question of diminished earning power, past and future. That is also foreign to this case, it will be seen without comment.

The next case is *Bierbach v. Goodyear R. Co.* 54 Wis. 208, 11 N. W. 514. The point under discussion was there presented to this court squarely for the first time. The plaintiff, when injured, was a manufacturer and dealer in machinery. On the trial he was permitted to testify in relation to his damages by reason of diminished earning capacity, that the average worth of his business before he was injured was $75 or $100 per month; that by reason of his injury he was compelled to give up his business. The point was made on appeal that proof of past profits in a mercantile business as a basis for proof of future damages to the proprietor thereof on account of the personal injury disabling him from continuing such business, was improperly received. It will be observed at once that the identity of the point presented with the one before us is perfect in every respect. The court, referring for authority to *Wade v. Leroy,* 20 How. 34; *Nebraska v. Campbell,* 2 Black. 590; *Masterton v. Mount Vernon,* 58 N. Y. 391, and *Lincoln v. S. & S. R. Co.* 23 Wend. 424, all of which are directly in point, said, as a basis for the assessment of damages, proof of the average value of the

plaintiff's business, while he carried it on, was clearly incompetent:

'It could not be established to enable the jury to estimate therefrom what the future profits would have been had the plaintiff not been injured, and had he continued the business. Such a basis for the estimation of future profits of the business in which the plaintiff was engaged is altogether too uncertain to furnish a safe guide for the verdict of the jury.'

An examination of the briefs used upon the argument of the case last above discussed, in connection with the report found in the books, leaves no reasonable ground, as it seems, to hold otherwise than that the evidence admitted was introduced, as in this case, for the purpose of proving diminished earning power by reason of inability to go on with the business of manufacturing machines and the prospective damages suffered thereby. That decision, in the twenty-one years since it was made, has never been doubted here to be a sound declaration of the law. During such time it has stood as a guide to bench and bar in this state and other states as well, as will be observed by noting the significance given thereto in the text-books and in decisions of other courts. Watson, Dam. for Pers. Inj. § 507; Sutherland, Dam. § 1246; 1 Sedgw. Dam. (8th ed.) § 181.

Now a few words in respect to the authorities cited by my brethren in support of their decision. I will not take time to refer to them except in a general way. Our Wisconsin cases have been sufficiently discussed. *Ballou v. Farnum,* 11 Allen, 73, is a good type of one class of such authorities. The only point decided there is that in an action of the character of the one before us the plaintiff may introduce evidence to show the kind of labor, mental and physical, he was accustomed to perform before the injury, as compared with what he was able to perform afterwards, for the purpose of enabling the jury to determine what compensation he should receive for his diminished capacity. That is unquestionably sound doc-

trine. There was no question involved in such case of the competency of evidence of past profits of business as evidence of lost earning power, past or future. *Ehrgott v. New York,* 96 N. Y. 264, is a fair type of another class of authorities cited by my brethren. The point decided there was that where the plaintiff was, when injured, engaged in a vocation such as that of a canvasser for the sale of books upon commission, his income depending wholly upon his personal services, evidence of his earnings in such vocation is proper to enable the jury to measure diminished earning power, past and future. That is also sound doctrine. The distinction between cases of that kind and the one before us need not be pointed out. A third class of my brethren's authorities is well represented by *Wallace v. P. R. Co.* 195 Pa. St. 127, 45 Atl. 685. That was a case involving proof of lost profits as bearing on diminished earning power prior to the trial, not as regards future earning power. Substantially all of the numerous authorities cited in the opinion of the court belong to one or the other of the classes given. My brethren, it seems to me, have fallen into a serious error in failing to note the distinction between proof of profits of a business as bearing on past loss, or earnings of a vocation carried on without capital, and profits of a commercial business, and the distinction between proof of the nature of a business performed by one before injury, and what he was able to do thereafter, disassociated with proofs of profits of a commercial business, and evidence of the past profits of a commercial business carried on by a combination of labor and capital as a basis for computing damages as regards diminished earning power.

It is sufficient for my purpose to bring to attention authorities holding that past profits in a commercial business do not constitute a legitimate basis for estimating future loss in respect to reduced earning capacity to the proprietor of such business, attributable to his inability to go on therewith on account of a personal injury. To that the authorities we

shall cite mainly go. On that precise point the books, we venture to say, are substantially all one way. If there are any out of harmony therewith, even one, we have been unable to find them. In asserting that there are none, we have distinguished company, as we shall show. The great weight of authority also condemns the use of evidence of profits of a commercial business as a basis from which to compute the earning power of the proprietor, past and future. If we were to take time and space to discuss the multitude of cases at hand and within easy reach, supporting the main proposition, this opinion would be drawn out to very great length. We will cite but a portion of them and comment on and quote from them to a moderate extent. We will name the following as unmistakably in point: *Walker v. Erie R. Co.* 63 Barb. 260; *Masterton v. Mount Vernon,* 58 N. Y. 391; *Johnson v. M. R. Co.* 52 Hun, 111, 4 N. Y. Supp. 848; *Pill v. B. H. R. Co.* 6 Misc. Rep. 267, 27 N. Y. Supp. 230; *Thomas v. U. R. Co.* 18 App. Div. 185, 45 N. Y. Supp. 920; *Read v. B. H. R. Co.* 32 App. Div. 503, 53 N. Y. Supp. 209; *Hewlett v. B. H. R. Co.* 63 App. Div. 423, 71 N. Y. Supp. 531; *Silsby v. Michigan C. Co.* 95 Mich. 204, 54 N. W. 761; *Orsor v. M. C. T. R. Co.* 78 Hun, 169, 28 N. Y. Supp. 966; *Wade v. Leroy,* 20 How. 34; *Boston & A. R. Co. v. O'Reilly,* 158 U. S. 334, 15 Sup. Ct. 830; *Goodhart v. P. R. Co.* 177 Pa. St. 1, 35 Atl. 191; *Marks v. L. I. R. Co.* 14 Daly, 61; 1 Sedgw. Dam. (8th ed.) § 181; Sutherland, Dam. § 1246; Watson, Dam. for Pers. Inj. § 507.

A study of those citations will show a sharp distinction between such cases as *Ehrgott v. New York,* 96 N. Y. 264, to which my brethren refer as substantially like the one before us, and the latter. *Masterton v. Mount Vernon, supra,* decided by the court of appeals of New York in 1874, and cited and followed by this court in *Bierbach v. Goodyear R. Co.* 54 Wis. 208, 11 N. W. 514, is the leading case in New York on the subject before us, and perhaps it is more often cited

elsewhere than any other case. There, for the purpose of showing damages attributable to diminished earning power of the plaintiff, who was a tea merchant, he was permitted in the trial court, against objection, to answer this question: "About what had been your profits, year by year, in that business?" In treating the assignment of error covering the matter upon appeal the court said:

"Where, in such a case, the plaintiff has received a fixed compensation for his services, or his earnings can be shown with reasonable certainty, the proof is competent [citing several cases]. In none of those cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what the future might probably be. *These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages.* . . . The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others."

The judgment was reversed.

In *Johnson v. M. R. Co.* 52 Hun, 111, 4 N. Y. Supp. 848, the reception of evidence of the character of that under discussion worked a reversal in the New York court. The respondent's counsel pointed to *Ehrgott v. New York,* as my brethren do, in justification of the ruling of the court below, but the appellate court said:

"The learned judge admitted the evidence of the aggregate amount of the plaintiff's earnings during the year or two prior to the accident. This was undoubtedly upon the strength of the decision . . . of *Ehrgott v. New York,* 96 N. Y. 265, in which a ruling admitting evidence of previous earnings was sustained; that case, however, is clearly distinguishable from the one at bar. In the case at bar it appears that the earnings of the plaintiff were the result of the use of his capital, and did not depend entirely upon his personal skill and services. In the case of *Ehrgott* the admis-

sion of the evidence was justified upon the ground that the plaintiff's income was not from capital invested, *but solely from his personal skill and services,* and, therefore, it formed an exception to the rule that previous profits in business are not admissible in evidence in cases of this description, because of their speculative character. . . . *In no case has it been permitted, where the profits of business arise from the investment of capital, that evidence of such profits should be offered for the purpose of enhancing the damages. It is only in cases where the earnings proceed entirely from the plaintiff's labor that the evidence becomes admissible.*"

In *Read v. B. H. R. Co.* 32 App. Div. 503, 53 N. Y. Supp. 209, the appellate division of the New York court followed the cases we have quoted from, reaffirmed the doctrine thereof, and took particular pains to indicate that the rule for recovering lost profits as damages for breach of contract has no application to a personal injury action, where the injury complained of consequentially affects the plaintiff's earning capacity in respect to the profits of a business enterprise, combining his personal services with capital, using this language:

"In the case of *Dickinson v. Hart,* 142 N. Y. 183, 36 N. E. 801, relied upon by the plaintiff to support the admission of the evidence as to the net earnings of the firm of which the plaintiff's intestate was a member, the action was for a breach of contract, and as was said in the case of *Walker v. Erie R. Co.* 63 Barb. 267, 'the rule so carefully maintained and guarded in actions upon contracts and for tortious injuries to property, is incapable of being applied where the injury is to the person; for those injuries are without precise pecuniary measure.' "

The same question was up in *Hewlett v. B. H. R. Co.* 63 App. Div. 423, 71 N. Y. Supp. 531, where there was a reversal for the allowance of evidence such as that under discussion, Justice JENKS, who wrote the opinion, saying:

"The plaintiffs could have proved the business in which the intestate was engaged, its extent, the particular part transacted by him, and the compensation usually paid to persons

doing such business for others. But the testimony admitted stated the past receipts of a business not dependent entirely upon personal services, but which involved the use of capital."

Such admission was held fatal to the judgment.

In *Boston & A. R. Co. v. O'Reilly,* 158 U. S. 334, 15 Sup. Ct. 830, decided by the federal supreme court quite recently, the point was made, the same as here, that *it was competent for the jury to make due allowance for interest upon capital and other matters chargeable to profits properly, in order to arrive at what part of the profits should be attributed to the earning power of the plaintiff, and thereby arrive at the proper measure of such power and the diminishment thereof by the injury.* But the court said that the allowance of evidence of the profits of the business was error; that in any event, *"the duty of the jury to find the wages or earnings of the plaintiff, after allowing for the interest on the capital invested, and for the energy and skill of the partners, could not, in the absence of evidence on those topics, have been intelligently performed."* The judgment was reversed, the court saying that the erroneous admission of evidence could not be overlooked, since it did not "appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting."

Having successfully, as it seems, covered the ground mapped out at the commencement of this opinion, my duty is ended. A brief recapitulation of the points of disagreement will enable one to see at a glance the merits of my position and the infirmity of the reasoning, as I think, which very naturally led my brethren to the conclusion from which I dissent.

1. The rule, that upon appeal error is not presumed, goes only to prevent consideration of matters not appearing upon the record, not to minimizing error which does appear.

2. Error appearing upon the record is presumed to have been prejudicial unless the contrary appears beyond reason-

able probability. To say that such error is to be deemed harmless unless the major probabilities are to the contrary is a direct reversal of an elementary principle.

3. When evidence is improperly admitted, the party duly objecting and excepting may stand upon his rights without further action. He is not called upon to request an instruction which will render such evidence harmless or be held to have waived the error.

4. An instruction good as an abstract statement of a legal principle applicable to a case does not render improper evidence harmless so long as such evidence may yet, within reasonable probabilities, have been viewed prejudicially.

5. The rule that lost past profits to a person, as to his business conducted by a combination of his personal services or other labor and capital, by a partial or total suspension of such business, measuring such profits by some reasonable, definite standard, such as that of profits realized in the same business before it was so wrongfully interfered with, and recoverable of another causing such suspension,—does not apply to consequential damages caused to a person engaged in such business by reason of his being wrongfully injured so as to be partially or totally disabled from attending to the same as usual, either as an independent element of damage, or as a basis for determining loss sustained by such person being injured in his earning power.

6. Profits of a business enterprise combining capital and labor do not in any case constitute a legitimate basis for estimating the earning power of one personally contributing the element of labor, in case of his being wrongfully injured so as to be unable as usual to furnish such element.

In my view the judgment should have been reversed and a new trial ordered unless the plaintiff should consent to such reduction from the amount recovered as in the judgment of this court would in all reasonable probability cure the error in permitting the evidence we have discussed.

DUNN, Plaintiff in error, vs. THE STATE, Defendant in error.

*April 23—May 8, 1903.*

*Criminal law: Homicide: Failure of accused to testify: Improper remarks of counsel: Error cured by subsequent charge.*

1. At the close of the testimony on the trial of one charged with murder, the district attorney in his argument to the jury was permitted to say: "If one of the jurymen were arrested on a charge at this time he could at least show himself—*he himself could show* the circumstances surrounding the affair, and not depend upon friends or relatives to get him out of the difficulty." One defense relied on was an *alibi*, but the accused did not take the stand as a witness on his own behalf. Upon objection being made to the remarks quoted, the district attorney explained that he made them in reply to an illustration used by the attorney for the accused in his opening statement, wherein was said: "If one of these jurors, at a certain time when they were sitting here in the jury box, was accused of a crime, that the defense would be an *alibi*, and the only defense." *Held*, that the remarks of the district attorney were improper and without justification, and left the jury to infer that the *accused* could himself alone, by taking the stand and testifying, have shown the circumstances without depending upon friends to do so for him.
2. In such case, although the failure of the court to condemn the objectionable remarks was error, it was cured by an instruction given in the general charge, that: "The statutes of our state provide *and you are so instructed*, that in all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness, but his refusal or omission to testify shall create no presumption against him," and further, that, "The argument of counsel is only for the purpose of aiding you to reach a proper verdict in the case, by refreshing in your minds the evidence . . . and by showing the law applicable thereto, *but, whatever counsel may say*, you will bear in mind that you are to decide the questions at issue free from bias, prejudice, or sympathy; that it is your duty to be governed in your deliberations by the evidence, . . . and the law as given by the court in these instructions."

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

The plaintiff in error was arrested in Milwaukee April 1, 1899. The information charged him and one Frank Foley—*alias* Kid Foley—with having on October 3, 1898, willfully, feloniously, and of their malice aforethought, killed and murdered one Emil Lieber, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin. Upon being arrested and arraigned in the municipal court for Milwaukee county, and the information being read to him, he pleaded "Not guilty." The cause having been tried, the jury at the close of the trial, January 30, 1900, returned a verdict wherein they found the plaintiff in error "guilty of murder in the first degree." Thereupon the court adjudged and sentenced the plaintiff in error, *Henry Dunn,* to "be punished by confinement at hard labor in the state prison . . . at Waupun for and during the full term and period" of his natural life. To reverse that judgment, this writ of error is sued out.

It appears that Emil Lieber was at the time of the alleged homicide forty-three years of age, and had a wife and four children, the eldest of which was fifteen years of age, and the youngest three years of age, and that he and his family lived in and conducted a saloon located in the town of Lake, in Milwaukee county, and about four blocks from the southerly limits of the city. He was a carpenter by trade, and in his absence during the daytime his wife conducted the saloon business, but he was in the habit of remaining at home from about seven o'clock in the evening to about six in the morning. It is claimed on the part of the state that, about nine o'clock of the evening in question, two men entered the saloon, one of whom was tall, light-complexioned, and fairly well dressed, and the other much smaller, and squatty in stature and swarthy in appearance, and after taking a number of drinks they both jumped up and said, "Hands up;" that Mrs. Lieber thereupon threw a beer bottle at them, when they immediately began firing their revolvers, and the husband was

shot and killed by the taller one of them. On the trial Mrs. Lieber was a witness on the part of the state, and identified the plaintiff in error as the man who shot and killed her husband. The plaintiff in error was at the time of the homicide employed as a brakeman on a freight train of the Chicago, Milwaukee & St. Paul Railway, running between Milwaukee and La Crosse. No witness was produced on the trial who knew the plaintiff in error prior to October 3, 1898, who gave testimony tending to prove that the plaintiff in error was seen either at or about the place of the commission of the crime on that night or at any other time. *The whole question of the guilt or innocence of the plaintiff in error turned upon the matter of identity.* Upon this point the evidence on the part of the state tended to prove: That the revolver which was found in *Dunn's* satchel at Portage a month later was the identical revolver which Mrs. Lieber saw in the hands of the tall man who shot her husband in the excitement and confusion of October 3, 1898. That the bullets taken from the body of the deceased at the post mortem were thirty-two and thirty-eight caliber bullets. That *Dunn* was in the city of Milwaukee on the night of the murder. That on the evening in question, at about six o'clock, a small-sized man—dark complexion—appeared at the livery barn of one Fahsel, in Milwaukee, and hired a horse and covered carriage for the purpose, as he stated, of taking his sister, who was sick, out for a ride. That later in the evening a taller man appeared at the same livery barn, and went into that department where the horses were kept. From there he went out into the street some distance, and remained standing on the side of the street, or in an alley. That shortly thereafter the smaller-sized man returned to the livery barn, secured a horse and buggy, and drove down the street until he came to where the taller man was standing, when the taller man got into the buggy, and they drove off in the direction of the saloon mentioned. That at the time of the shooting a horse hitched to a top buggy was

tied in the vicinity of the saloon. That after the shooting two men were seen to unhitch the horse and drive away, and after ten o'clock it was claimed that the horse and buggy were driven past the livery stable, with but one man occupying the buggy. The horse was not returned to the livery barn, but was found somewhere out in Waukesha county three or four days thereafter. That for a few days prior to October 3, 1898, and the next day thereafter, the plaintiff in error was associating with a low, thickset, dark-complexioned man. That he was seen in company with such person at La Crosse, and requested the conductor to convey him to the city of Milwaukee on the freight train. That at *Dunn's* request he was carried from La Crosse to Milwaukee on the freight train, and on its return trip was taken back to La Crosse. That prior to the evening in question *Dunn* was associating with a low, dark-complexioned, thickset man at Portage, and that he was seen with the same person at Portage on the night of October 4, 1898. That after the homicide *Dunn* frequently referred to it, and the account of it given in the papers. That the next day after the homicide *Dunn* showed one of the witnesses two revolvers, and told her that his partner shot Lieber. That in commenting upon the account in the papers, which stated that the deceased's wife threw a beer bottle, *Dunn* stated to the witness that Lieber would not have been shot if his wife had not interfered.

For the plaintiff in error there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *J. L. O'Connor* and *J. B. Doe.*

For the defendant in error there was a brief by *A. C. Umbreit,* of counsel, a supplemental brief by the *Attorney General* and *Walter D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

CASSODAY, C. J. It is conceded that Emil Lieber was murdered by somebody at the time and place mentioned in the

testimony. On being arraigned, the plaintiff in error pleaded "Not guilty;" and, in the language of the trial court in charging the jury, he "interposed as a defense what is known in law as an *'alibi;'* that is, that he was at the time of the killing of Lieber at another and different place than that in which the crime was committed, and therefore was not and could not have been the person, or one of the persons, who committed the same." In the same connection the court charged the jury that "such defense is as proper and legitimate as any other, and the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal." The whole question of the guilt or innocence of the plaintiff in error turned upon the matter of his identity. With the exception of the testimony of Mrs. Lieber, mentioned, the evidence is entirely circumstantial. It is conceded on behalf of the accused "that if the jury disbelieved the testimony of the defense, and believed the testimony of the state, they would be warranted in finding a verdict of murder in the first degree." But the same counsel insist, as they have a right to insist, "that, no matter how enormous the crime, or the brutality with which it was perpetrated, any citizen charged therewith is entitled to a fair and impartial trial according to the rules of law and evidence." The only error relied upon for a reversal is in permitting the state's attorney, in his argument to the jury at the close of the testimony, to say "that, if one of the jurymen were arrested on a charge at this time, he could at least show himself—*he himself could show* the circumstances surrounding the affair, and not depend upon friends or relatives to get him out of the difficulty"—or to say that in substance. Upon exception being taken to such remarks, the state's attorney attempted to justify the same by claiming that in making such remarks he was simply referring to and commenting upon an illustration used by counsel for the accused in his opening statement, wherein he said:

"If one of these jurors, at a certain time when they were sitting here in the jury box, were accused of a crime, that the defense would be an *alibi* and the only defense."

The court verified that as being the statement made by counsel for the accused, and thereupon the state's attorney stated that, in replying to and commenting upon that statement, he had argued that "if that was true—if that would have been and could have been the only defense—at least they could explain the circumstances surrounding the act, and not rely upon others to explain *where they were* or what they had done at that time." To those remarks counsel for the accused excepted. Thereupon the court stated that counsel for the state had simply made a reply to a statement made by counsel for the accused, and when counsel for the accused remonstrated he was told by the court to go on; that he would have the benefit of an exception. The defense was an *alibi*. The accused did not take the stand as a witness in his own behalf, as he had a legal right to do under the statute (sec. 4071, Stats. 1898). But that statute declares that "his refusal or omission to testify shall create no presumption against him." The remarks of the state's attorney, above quoted, and to which exceptions were taken, left the jury to infer that the accused could himself, alone, by taking the stand as a witness in his own behalf, have shown "the circumstances surrounding the affair, and not depend on friends or relatives to get him out of the difficulty." It was not justified by what was so said by counsel for the accused. Comment to the jury by the district attorney upon the fact that a person on trial for crime "did not offer himself as a witness in his own behalf" has been characterized by this court as a "gross impropriety." *Martin v. State,* 79 Wis. 165, 175, 48 N. W. 119, 122. For counsel to abuse his privilege has frequently been condemned in civil cases. *Andrews v. C., M. & St. P. Ry. Co.* 96 Wis. 348, 361, 362, 71 N. W. 372; *MacCarthy v. Whitcomb,* 110 Wis. 124, 85 N. W. 707, and cases there

cited. Under a similar statute, the supreme court of the United States has strongly condemned such comments. *Wilson v. U. S.* 149 U. S. 60, 66, 67, 69, 70, 13 Sup. Ct. 765. In that case Mr. Justice FIELD, speaking for the whole court, among other things, said:

"It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. . . . Counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify."

Quoting approvingly from another case, it is there said:

"When the statute says that no presumption against the accused shall be created by his neglect to testify, it clearly meant that, in cases where the defendant should not choose to avail himself of the privilege offered by the statute, the trial should be conducted in the same manner and upon the same presumptions as if the statute had not been passed." See, also, *Hall v. U. S.* 150 U. S. 76, 81, 82, 14 Sup. Ct. 22.

In the case at bar the trial judge, when his attention was called to the remarks, should have promptly condemned them. But with some hesitation, we are constrained to hold that such error, in view of the charge of the court which followed, should not work a reversal in this case. The court charged the jury:

"The statutes of our state provide, *and you are so instructed,* that 'in all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness, but his refusal or omission to testify shall create no presumption against him or any other party thereto.' "

The court then added:

"The argument of counsel is only for the purpose of aiding you to reach a proper verdict in the case, by refreshing in your minds the evidence which has been given to you in this cause, and by showing the application of the law thereto; *but, whatever counsel may say,* you will bear in mind that you are to decide the questions at issue free from bias, prejudice, or

sympathy; that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be, and by the law as given by the court in these instructions, and render such verdict as in your conscience and reason and candid judgment seems to be just and proper."

Thus at the very close of the trial the jury were "instructed" that the "omission" of the accused to testify should "create no presumption against him;" that the argument of counsel was only to aid them by refreshing in their minds the evidence, and showing the application of the law; and that they were to decide the questions at issue according to the evidence, and the law as given to them by the court, free from bias, prejudice, or sympathy, and regardless of the remarks of counsel. Such charge, we are forced to believe, was sufficient to do away with the inference which the jury might otherwise have drawn from the remarks of the state's attorney to which exception was taken. There is no claim of any other error calling for consideration.

*By the Court.*—The judgment of the municipal court of Milwaukee county is affirmed.

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PAULSON, Plaintiff in error, vs. THE STATE, Defendant in error.

*April 23—May 8, 1903.*

*Criminal law: Murder:* Corpus delicti: *Evidence: Impeaching testimony: Appeal: Material error: Argument of counsel:* Alibi.

1. On a prosecution for the murder of a sixteen-year-old girl it appeared, among other things, that she had been left alone in a farm house, and during the absence of the other members of the family the house was burned. There was evidence tending in some measure to prove that a robbery had occurred in the house. By way of identification it appeared that after the fire the trunk of a human body was found lying in the cellar, upon what appeared to be the coals of a prepared pile of cord-wood,

carried into the cellar after the departure of the other members of the family. The trunk, consisting of the head, spinal column and pelvic bones, was of such size as to be consistent with the description of the missing girl, and the teeth in the skull were similar in appearance with her teeth. *Held*, that the evidence presented a state of facts to the jury, from which they might be satisfied with the necessary certainty that the body found was that of the girl, and that her death had occurred by criminal means.

2. In criminal prosecutions, evidence against the accused should be confined to the very offense charged, and neither general bad character, nor commission of other specific disconnected acts, whether criminal or merely meretricious, can be proved against him, except where so connected with the offense charged that their commission directly tends to prove some element of alleged offense.
3. On a prosecution for murder, it is palpable and gross error to permit evidence that some three years before the alleged crime the accused had been convicted of larceny, or in permitting any other derogatory facts to be proved against him in any way.
4. On a prosecution for murder, in connection with which robbery was committed, one of the circumstances relied upon by the state was the fact that the accused had money after the crime, when he had not had any before, and there was evidence that he had stated that he had obtained the money by theft of wheat prior to the murder. *Held*, that such evidence did not warrant admission of evidence as to the commission of such theft by accused. The fact of guilt or conviction was not a proper one to be proved, even on the accused's own admission, standing alone. It could only be admissible, if at all, because it was part of a statement relating to other and relevant facts.
5. In such case, the best and only proper evidence being the records, it was error to allow parol proof of the various court proceedings.
6. In such case, admitting such parol evidence, even for the purpose of impeachment, is error. Parol proof of a prior conviction can be made only by virtue of sec. 4073, Stats. 1898 (providing that a person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility, either by the record, or by his own cross-examination), and then only by cross-examination.
7. To warrant an appellate court in deeming an error innocuous, it should appear beyond a doubt that the error complained of

did not and could not have prejudiced the rights of the party duly objecting.

8. Where, in a criminal trial, error was committed in proving by parol evidence, and as part of the state's case, prior convictions of accused for criminal offenses, such error is not cured or waived by the fact that accused afterwards takes the stand as a witness, and thereby opens the door to proof of a prior conviction, by way of impeachment.

9. On a prosecution for murder, one of the circumstances relied upon by the state was the fact that the accused had money after the crime had been committed, and the state drew out a portion of a conversation, which was made the basis of an argument, that the money which the accused was shown to have was the same stolen at the time the murder was committed. *Held*, that it was error to exclude proof, offered by the accused, of other parts of that conversation, and that such error was prejudicial.

10. On a prosecution for murder, the district attorney, in his opening to the jury, and before the taking of any evidence, stated, as a fact, that the accused, on the day before the event, was seen so close to the house, and under such circumstances, as to arouse suspicion of bad purpose—detailing such circumstances—of which facts not the slightest shred of evidence appeared throughout the case. *Held*, that such statements were extremely improper in the absence of a well-founded belief on the part of the district attorney that he could show such facts.

11. On a prosecution for murder, where it appeared that the body of deceased was consumed after the killing by the burning of the house in which the crime was alleged to have been committed, it is not error to admit in evidence photographs showing the ruins and the surrounding premises, after testimony had been given showing them to be correct representations of the scenes attempted to be portrayed.

12. In such case, it is not error to admit in evidence a partially burned block of wood taken from the pile of charcoal on which the body was found.

13. On a prosecution for murder, a witness testified, in effect, that he was of the opinion that accused was the same person seen by him at a certain place the night of the crime. The language of the witness as to reaching a belief of the identity of the two from information derived from others might well have been construed as applying to a conclusion reached by him before seeing the defendant, and was not inconsistent with the view that the testimony to his identity was based upon memory of the person seen by the witness, and observation of de-

fendant in court. *Held*, that the refusal of the trial court to strike out such testimony should be sustained on appeal.

14. On a prosecution for murder, evidence as to the conduct of the accused during the period of his flight from arrest, covering his conduct, numerous declarations shown not to be true, the use of assumed names, his places of residence, the use of money, carrying fire arms, and the like, is admissible as bearing on the probability of his guilt.

15. On a prosecution for murder for the purpose of a robbery, which was then and there committed, the accused, on cross-examination, was asked if he had stated that he knew a place where he could get some money, and, if there was anybody in the house, it would be easy to hit him on the head, and nobody would ever find it out, which he denied, and the state was allowed to introduce in rebuttal proof of such conversation. *Held*, that, in the absence of a request for an instruction that such evidence on behalf of the state could be considered only for the purpose of impeachment, the admission of such evidence is not error.

16. On a prosecution for murder, accused, in attempting to prove an *alibi*, testified to a trip taken by him on the night before the day of the crime, and described a locomotive on which he claimed he rode. *Held*, that a witness, who testified that he had been a brakeman on such railroad, and that he knew the only type of locomotives used on that road, was qualified to state that the locomotives used by the railroad company did not correspond with that described by the defendant as mounted and ridden by him on the night in question.

ERROR to review a judgment of the circuit court for Buffalo county: E. W. HELMS, Circuit Judge. *Reversed.*

Writ of error to conviction and sentence of the plaintiff in error, hereinafter called the "defendant," of murder in the first degree, for the murder of one Mary Seldon at the town of Pepin on June 16, 1898. The general course of events, as claimed by the prosecution, was substantially as follows:

On the date named, Thomas Seldon, a farmer, residing about two miles from Pepin, left home to attend a veterans' reunion at Pepin, together with all his family except his sixteen-year old daughter Mary, who was left in charge of the house, at from 9:30 to 10:30 in the forenoon. He left approximately $400 in a locked secretary in said house, con-

taining, amongst other things, thirteen $20 gold pieces and one $10 gold piece, the remainder being mainly in paper, with some silver. The daughter, Mary, was a quiet, homestaying girl of cheerful disposition, and exhibiting nothing abnormal in her disposition. Somewhere about 1 o'clock the house was discovered to be on fire by a passing farmer, who entered the premises, saw no one, made some entirely futile attempts at checking the fire, and then devoted himself to setting at liberty certain animals, and saving a buggy, and perhaps other property, from the sheds; he not being able to enter the house by reason of its being locked and by reason of the extent of the conflagration. An hour or two later, when the destruction was practically complete, Mr. Seldon, and about the same time some others, arrived on the ground, and about this time was discovered the trunk of a human body lying in the cellar of the one-story kitchen, upon what appeared to be the coals of a prepared pile of firewood, entirely distinct from the debris of the burned building, and of magnitude about six or eight feet square and some eighteen inches deep. A careful search in the ashes under the place where the secretary had stood resulted in the finding of no coins except two nickel pieces and a two-shilling pocket piece; also the lock of the secretary. There is no evidence of any one's being known to enter the premises after Seldon's departure until the discovery of the fire, except a son, who testifies that he came from another farm, put up his horses, got something to eat, and then himself went to Pepin to attend the reunion, perhaps an hour later than the others. The defendant resided with his father some five or six miles in another direction from the village of Pepin, and was not shown to have any recent knowledge of the Seldon premises. It was proved that he declared, a day or two before the 16th, that he was without money. It appeared that certainly on the morning of the 17th he was in St. Paul and Minneapolis, and made certain purchases, and expended money to the amount of $20 or $25. Upon inquiry

he claimed to have started for St. Paul during the night of the 15th, and, by stealing rides, to have arrived in St. Paul about noon of the 16th. Evidence was offered, in contradiction of this, that he was seen at Stockholm, on the Wisconsin side of Lake Pepin, and again in Lake City, on the Minnesota side, in the evening of June 16th, and that a boat was taken from the shore at Stockholm the evening of the 16th, and found on the shore at Lake City the following day. The identification of the defendant as the person so seen was a subject of dispute. He was arrested on June 20th, and in the August following made his escape from the county jail, after being informed that there was a threat of lynching. After some days of hiding, during which he visited his father's house, he fled to North Dakota, where he adopted an assumed name, and, after some farm work, spent the winter in a shanty in a remote region, hunting and trapping. Evidence was offered of the expenditure by him of considerable sums of money, including some six or seven $20 gold pieces. Other facts material to specific errors appear in the course of the opinion.

*S. G. Gilman,* for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

DODGE, J. 1. The first branch of the contention of plaintiff in error is that the evidence was not sufficient to establish beyond a reasonable doubt either of the three elements of the alleged crime—the *corpus delicti,* the identity of the body, nor defendant's commission of the crime. It is neither necessary nor seemly for us to express the conclusions which, as individuals, we might have reached from a consideration of all this evidence. It is immaterial whether any member of the court might or might not have been convinced beyond a reasonable doubt of all or any of these elements of the crime

charged. The question is whether the jury, as reasonable men, might have been so convinced; and in approaching that question it must be recognized that they had the right to believe one witness and equally to disbelieve another completely, or to accept as true and correct part of the testimony of any witness and to reject other parts; to weigh the interest and animus of each, and in so doing to be affected and guided by the appearance of each witness and his manner of testifying. In the light of these rules and considerations, we proceed to examine the evidence.

We have before use the facts that, a few hours before, a sixteen-year-old girl was left in this farmhouse with every probability, from her character and habits, that she would be found there alive on the return of her parents later in the day; that a body was found after the destruction of that house by fire, under circumstances which might warrant the inference that, at the expense of much exertion, a considerable quantity of cordwood had been carried into the cellar, and the body placed upon it after life was extinct. Supplementing these was the circumstance, which evidence tended in some measure to prove, that a robbery had occurred in the house. By way of identification it was testified that the bones which remained, consisting of the head, spinal column, and the pelvic bones, were of such size as to be consistent with the description of this sixteen-year-old girl; and one witness, who knew her intimately, testified to similarity in appearance of the teeth to those of Mary Seldon, which were described as peculiar. True, in many of these respects doubt might well arise as to the ability of a witness to testify with any certainty to such facts, but those doubts were within the province of the jury, and bore not upon the competency of the evidence, but upon its weight. Hence there was evidence of the existence of a dead body, of its identity as that of Mary Seldon, who was alive a few hours before, and there were facts and circumstances from which might well have been

drawn inference of sudden and unusual death, with other facts and circumstances warranting inference against suicide or accident. Under the rules of law with reference to the character and *quantum* of proof necessary to establish the *corpus delicti* and identity, as declared in *Buel v. State,* 104 Wis. 132, 80 N. W. 78, we are forced to the conviction that the field was open to the jury, without outrage upon reason, to be satisfied with the necessary certainty that the body found was that of Mary Seldon, and that her death had occurred by criminal means.

The more salient evidence bearing upon the connection of the defendant with such crime has already been related in the statement of facts. The presence in this house of money to serve as a motive, although there is little or no evidence that the defendant knew of it; the almost complete desertion of this and neighboring farm houses by reason of the gathering in Pepin; the disappearance of the money—all of which the jury might within reason have believed from the evidence—present opportunity and motive for one living in the neighborhood. The fact, if the jury concluded it so to be, that defendant a day or two before had no money, and on the following day had money, is significant. The further fact, in this immediate connection, that after an incarceration of a few months, and his escape from jail to the Dakotas, he was in possession of money in considerable amounts, including gold coins such as disappeared from this house, which, it must be confessed, are not the customary form of daily exchange, is also a circumstance entitled to weight. The defendant, at great length, detailed the course of his transactions and the extent of the work done and moneys earned during that period, and that evidence was subject to analysis and credit or discredit, according to probabilities, by the jury, and, in our opinion, might, at their hands, have received such construction and such belief as to constitute to their minds a false story built up for the purpose of accounting for the

possession of this amount of money and of these gold pieces, and therefore in itself an evidence of guilt. During this same period the conduct of the accused was covered in minute detail by the production of witnesses at almost every stage of the events, indicating an industry and intelligence of research on the part of the prosecution most commendable. It took a wide range, covering the use of assumed names, of various statements made by accused as to his prior history, his place of residence, his possession of money and the source thereof, and of peculiar precautions in the giving of addresses for the receipt of mail and the like; many of which might have been deemed by the jury significant of a consciousness of guilt and desire to elude pursuit. Of course, those triors of fact might have deemed the fact established that defendant was in terror of lynching, and that these precautions were referable thereto, rather than to any sense of guilt; but equally they might not have so believed, and the weight of such circumstances as proof of defendant's guilt of the crime charged was, therefore, in their hands; and with their conclusion, confirmed by the opinion of the trial judge, indicated by his overruling of motions for new trial and in arrest of judgment, it is not the province of an appellate court to interfere. Again, the very attempt to establish an *alibi* on June 16th, if the story were a fabrication, as the jury might have believed, might have been deemed significant of guilt, especially in connection with the furtive method of the actual trip on the evening of June 16th, if the jury believed in the identification of defendant at Stockholm and Lake City. Without further discussion of the evidence, but after carefully considering all of it, we find ourselves unable to say that the jury might not, as reasonable men, have reached conclusions adverse to defendant's innocence upon each and all of the elements of the crime charged, beyond reasonable doubt; and we should not feel bound or justified in denying final effect to their decision on that question of fact, if satisfied that it has been

reached without the influence of improper evidence and under correct rules of law.

2. Several assignments of error are predicated upon the introducing in evidence, over objection and exception, of certain items of defendant's history in no wise connected with the crime charged, but tending to vilify or degrade him in the minds of the jury; especially that some three years before he had been guilty of stealing a quantity of rye from a farmer in Minnesota; that at first, on preliminary examination, he pleaded guilty, but later, when arraigned for trial, he changed front, and denied guilt; that after commitment by the justice he was confined in jail; that he was tried upon an indictment the contents of which were testified to orally; that four witnesses, whose names were given, testified against him; that a verdict of guilty was returned against him, and that the court sentenced him to the state reformatory. All the foregoing was given verbally in making the state's original case, against objection for immateriality and because not the best evidence. In addition to this, the state introduced the certified record of a conviction for larceny of certain rye in 1895, and of sentence. Another—perhaps trifling—item of evidence was to the effect that five years before the offense charged defendant had been a medicine peddler.

From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him. An exception is indulged where other crimes are so connected with the one charged that their commission directly tends to prove some element of the

latter—usually guilty knowledge, or some specific intent. We mention this exception merely for accuracy, to qualify the generality of the foregoing statement. It obviously can have no application to such remote and disconnected events as those here presented. The cases in which overzealous prosecutors have trespassed upon this rule, so that appellate courts have had occasion to give it reiteration, are almost without number. Many are collected in a note in Wharton, Crim. Ev. (9th ed.) § 30. A few others may be cited: *Regina v. Oddy,* 5 Cox, Cr. C. 210; *Boyd v. U. S.* 142 U. S. 450, 458, 12 Sup. Ct. 292; *Shaffner v. Comm.* 72 Pa. St. 60; *Comm. v. Jackson,* 132 Mass. 16; *Sullivan v. O'Leary,* 146 Mass. 322, 15 N. E. 775; *Lightfoot v. People,* 16 Mich. 507; *Albricht v. State,* 6 Wis. 74; *Schaser v. State,* 36 Wis. 429; *State v. Miller,* 47 Wis. 530, 3 N. W. 31; *Ingalls v. State,* 48 Wis. 647, 654, 4 N. W. 785; *Fossdahl v. State,* 89 Wis. 482, 62 N. W. 185. The foregoing cases are referred to not so much to establish the rule that evidence of such remote acts is irrelevant, and therefore inadmissible, for that must be obvious at a glance. That one stole rye from some one in Minnesota in 1895 has no tendency to prove that he committed this murder in Wisconsin in 1898. They are cited more especially to show how uniformly courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged when their minds have been prejudiced by proof of bad character of accused or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question whether the real evidentiary facts fasten guilt upon him beyond reasonable doubt. In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect. In a case of this sort, where it is believed that so horrible a crime has been com-

mitted, and where naturally and properly there is great anxiety that such outrage do not go without retribution upon the perpetrator, as to whose identity the field of speculation is wide, the tendency to fasten suspicion upon some member of the community whose record is bad is very strong, and fraught with great danger to the unfortunate individual, however innocent. In such a case a most imperative duty rests upon the court to take every precaution that such facts as we are now considering do not reach the knowledge of the jury. While it is awful that such a tragedy as this may happen in a civilized community, and the guilty man escape punishment, it is inexpressibly worse that the law itself should add thereto the still more terrible crime of imprisoning for life an innocent person; thus subjecting the community to two crimes, instead of one, and leaving the criminal still unpunished. Whether such result has been accomplished by the judgment here we cannot know with certainty, but it is at least possible, if the minds of the jury have been subjected to the perverting influence of irrelevant facts and circumstances, which do not logically nor legally tend to establish guilt, but which may naturally turn suspicion in defendant's direction, and create a prejudice against him, depriving him of that impartiality and anxious regard for his safety, if innocent, which the jury owe him were he the vilest of the vile.

The attorney general seeks, not so much to justify, but rather to palliate, the admission of the testimony as to the criminal proceedings on the ground that the court ruled it admissible as tending to identify the transaction with that claimed to have been mentioned by the defendant to the district attorney in accounting for his possession of the money he spent in Minneapolis and St. Paul. It could not be so justified, even if it had such tendency. The fact of previous guilt or conviction was not a proper one to be proved, and defendant's own admission thereof, standing alone, would not have been admissible. It could come in only because it was

part of a statement relating to other and relevant facts. *Lightfoot v. People,* 16 Mich. 507; *Coleman v. People,* 55 N. Y. 81, 89. It could not open the door for affirmative and original proof of the forbidden fact. Defendant had a right to go to the jury upon contention of either falsity or inaccuracy of the testimony that he had made such statements; which, by the way, hardly admitted conviction, even as narrated by some of the witnesses to the conversation. Further, however, the extended and graphic narrative of the proceedings in the Minnesota court was not at all necessary to the attempted identification. The only word from the witness who gave it which could have had any relevancy to the case on trial was the statement that only on one occasion was defendant present in the Minnesota court, thus giving significance to the testimony of Johnson, the then prosecuting witness, that defendant declared to him that all money received for the rye in question had been spent. It should be noted, however that no such excuse was even offered for admitting in evidence the certified record of the conviction. That was expressly received by the court to prove the fact that defendant had been convicted of a crime.

We are thus brought irresistibly to the conclusion that palpable and grave error was committed in permitting any of these derogatory facts to be proved against the accused in any way. In addition to this fundamental error, it was also clearly erroneous to allow parol proof of the various court proceedings, of which the best and only proper evidence was the record. *Kirschner v. State,* 9 Wis. 140, 145; *Ingalls v. State,* 48 Wis. 647, 655, 4 N. W. 785. Even for purposes of impeachment, parol proof of a prior conviction can be made only by virtue of statute (sec. 4073, Stats. 1898), and then only by cross-examination. To that extent only has the present statute modified the rule declared in the two cases last cited.

That the errors committed in the admission of these various

items of evidence were well calculated to prejudice the accused cannot be seriously doubted. His right was to have the jury weigh all the suspicious circumstances upon the presumption that he was a man of ordinarily good character and reputation; to dwell upon the consideration that circumstances may be accumulated against any person, and the conclusion of guilt be still in reasonable doubt, for the reason alone that ordinary persons seldom or never commit such atrocities as this. Hardly any consideration could more probably hasten the jury to ignore that doubt than that the accused was not one of ordinary character, but a convicted criminal, familiar with the inside of jails and their debauching effects. When distinct error is committed, courts cannot lightly assume that no prejudice has resulted. Prejudice is the ordinary result of breach of a rule of law, else the rule itself could have no right to exist. To warrant appellate courts in deeming an error innocuous, it is said, "It should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting." *Boston & A. R. Co. v. O'Reilly,* 158 U. S. 334, 337, 15 Sup. Ct. 830. Such considerations as just stated constrain us to disagreement with the contention that the error in proving the various derogatory or degrading facts in defendant's history must be deemed nonprejudicial because afterward the defendant took the stand as a witness, and thereby opened the door to proof of a prior conviction by way of impeachment, so that at worst this objectionable evidence was merely received out of order. To this it might well be urged that the order in which facts are brought to the minds of the jury may substantially vary the effect. It is, however, sufficient answer to this argument that the evidence received over objection far exceeded anything which would have been admissible by way of impeachment, even after defendant had testified. Proof of specific acts of crime or misconduct is generally not admissible for impeachment. Roscoe, Cr. Ev.

(11th ed.) pp. 95, 142; *Rex v. Layer,* 16 How. St. Tr. 285; *Comm. v. O'Brien,* 119 Mass. 342; *Carthaus v. State,* 78 Wis. 560, 47 N. W. 629; *Emery v. State,* 101 Wis. 627, 650, 78 N. W. 145. It is only by virtue of statute that the fact of previous conviction is an exception to that rule. (See note to sec. 4073, Stats. 1898; Roscoe, Cr. Ev. p. 95.) That statute permits no other exception than proof of the fact of conviction, and permits that proof only by cross-examination of the witness himself, or by the record. The trial court permitted proof of various specific facts tending to degrade the defendant, other than the mere fact of conviction, and permitted that proof to be made by parol evidence from witnesses other than accused. This, as already stated, could not have been done by way of impeachment; hence the error was in no wise cured or waived by the fact that defendant took the stand, and thereby subjected himself to proper impeaching evidence.

3. Error is also assigned because defendant was precluded from proving the balance of a conversation, part of which the state had given. The court apparently applied rather strictly a rule limiting cross-examination to the exact subject of direct examination. The right of a party to call witnesses to testify further as to a conversation of which part has been proved by his adversary is not so limited. In general, such party has a right to give the whole of such conversation, at least so far as it has relation to the subject-matter of the action, and is not confined to that particular part thereof given by his adversary. Roscoe, Crim. Ev. (11th ed.) p. 51; *Mack v. State,* 48 Wis. 271, 279, 4 N. W. 449; *Plano Mfg. Co. v. Frawley,* 68 Wis. 577, 585, 32 N. W. 768; *Fertig v. State,* 100 Wis. 301, 307, 75 N. W. 960; *Frank v. State,* 27 Ala. 37; *Dodson v. State,* 86 Ala. 60, 5 South. 485. The portion of the conversation drawn out by the state, among other things, was made a basis for argument that the money which defendant had in Dakota in the fall of 1898 was the same

stolen at the Seldon house, because he visited his father's house before going west, and might thus have repossessed himself of that money. If, in the same conversation, defendant negatived such inference by explaining where and how he obtained money—as we understand he did—such statements related to the same subject-matter, and served to explain and qualify the portion made use of by the state. We are persuaded that the exclusion of proof of other parts of this conversation was error which might well have prejudiced defendant by withholding from the jury the fact that his whole statement, taken together, rebutted, instead of supported, the inference urged by the prosecution.

4. Error is also assigned upon the claim that the district attorney, in his opening to the jury, before the taking of any evidence, stated as a fact that the accused, on the day before the event, was seen so close to the house, and under such circumstances, as to arouse suspicion of a bad purpose—not upon the traveled highway, but upon the road east of the Seldon house, in the edge of the woods, in company with unknown persons, who immediately disappeared, and went into the woods—of which facts not the slightest shred of evidence appeared throughout the case. Such a statement was undoubtedly calculated to greatly prejudice the accused. It served to keep him in the minds of the jury, marked as a legitimate person for suspicion, while the various facts and circumstances were being brought out in evidence, which otherwise would have had no special application to him. It also supplied to their minds that which was especially lacking in the evidence, namely, the prior contact of the accused with the immediate vicinity, at any rate within many years. If the prosecuting attorney made such a statement without a well-founded belief that the proof was in his hands, he could not be too strongly reprehended, and the prejudice would be so obvious as to make very cogent ground for the circuit court to deny or set aside conviction. We are loath to believe that he

could have been guilty of such a breach of professional and official ethics; and, while it is somewhat difficult, in view of the absolute absence from the record of any offer to make such proof, to conceive circumstances which should justify it, we must, in justice to the high character of this officer, indulge ourselves in the belief that at the time of making the statement he thought he had witnesses to testify to such fact. We shall content ourselves with pointing out the impropriety of the statement in the absence of such well-founded belief, without attempting to decide whether the statement of itself must constitute reversible error, in the absence of any request to the trial court to take action to rebuke the same, and warn the jury against allowing it any effect.

5. Error is alleged upon the introduction of a number of photographs showing the ruins and the surrounding premises. Testimony showed them to be correct representations of the scene attempted to be portrayed. We think they fall within the rule of admissibility as outlined in *Selleck v. Janesville,* 104 Wis. 574, 80 N. W. 944, and that the error is not well assigned.

Neither can we persuade ourselves that there is reversible error in the admission in evidence of a partially burned block of wood taken from the pile of charcoal on which the body was found.

Again, the refusal to strike out the testimony of a witness—Gludt—to the effect that he was of the opinion that accused was the same person seen by him in Lake City, Minnesota, the evening of June 16th, which is assigned as error, we think should be sustained. The language of the witness as to reaching a belief of the identity of the two from information derived from others might well have been construed as applying to a conclusion reached by him before seeing the defendant, and is not inconsistent with the view that the testimony to his identity was based upon memory of the person seen at Lake City and observation of the defendant in court.

Of course, the trial court had a better opportunity to judge on that question, and we cannot disturb his resolution of the uncertainty arising from the testimony.

A large amount of evidence, not necessary to mention in detail, was given with reference to the conduct of defendant during the period of his flight from arrest, covering his conduct, numerous declarations shown not to be true, the use of assumed names, his place of residence, the use of money, carrying of firearms, and the like. This has been examined carefully, without impressing upon us that it presents anything of prejudicial error. Conduct of a suspected person after the crime is a legitimate subject for consideration, as bearing upon the probability of his guilt; and it is not easy, if at all possible, for courts to draw any line segregating those acts which to some minds may seem significant of guilt from those which are irrelevant because justifying no such inference. We are unable to say that any of those assigned as error necessarily fall within the latter category.

Complaint is made that the state was allowed to introduce in rebuttal proof of a conversation in which the defendant was said to have stated that he knew a "place where he could get some money, and, if there was anybody in the house, it would be easy to hit him on the head, and nobody would ever find out." Defendant had been asked on cross-examination if he did make such a statement to the witness at the time alleged, and denied it. The evidence is claimed to have been used not merely for purposes of impeachment, but as substantive proof of knowledge of opportunity, and hence of motive. Of course, if it were admissible at all for the latter purpose, it should have been offered by the state in its original case. Offered as it was, its admission was justified merely by the fact that defendant had, on cross-examination, denied the conversation. It was presumptively offered and received only as impeaching him, and the court might well have instructed the jury that they were to consider it only for that

purpose, if so requested. Inasmuch as no such request was made, however, we can discover no specific reversible error in connection with it. The evidence was admissible at the time it was offered.

A former brakeman of the Burlington Railroad was allowed to testify that in 1898 the engines used by that company did not correspond with that described by the defendant as mounted and ridden by him on his alleged trip to Minneapolis on the night of the 15th. The witness had qualified himself by testifying that he knew the only type of engines which were used by that railroad. Whether this was true or not, it qualified him *prima facie* to state their characteristics, and that they did not have the appliances which defendant had described upon the engine boarded by him.

We find no other assignment of error which seems to require specific consideration in this opinion.

For the reasons above stated, the jury's decision of guilt is inconclusive. They have reached it only by considering facts which the law denies them the right to consider. They have been deprived of facts which the law required they should know and consider. It is, of course, greatly to be regretted that the great labor of this protracted trial should have been rendered futile by these errors therein. No such consideration can, however, bear any comparison in importance to the possibility that an innocent man is now suffering imprisonment at the hands of the government. That he is innocent is presumed in all courts until a conviction has been had without departure from the rules which the law, in its wisdom, has found necessary for the protection of the safety and freedom of the individual.

*By the Court.*—Judgment reversed, and cause remanded for a new trial. The warden of the state prison will deliver the plaintiff in error to the sheriff of Buffalo county, who is directed to keep the said Paulson in his custody until he is duly discharged therefrom, or until otherwise ordered according to law.

BIRKER, Plaintiff in error, vs. THE STATE, Defendant in error.

*April 23—May 8, 1903.*

*Criminal law: Assault with intent to murder: Lesser offense: Conviction of assault with intent to do great bodily harm.*

1. Under sec. 4695, Stats. 1898 (providing that whenever any person indicted or informed against for felony shall on trial be acquitted by verdict of part of the offense charged and convicted of the residue thereof, such verdict may be received and recorded by the court, and thereupon the person charged shall be adjudged guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such indictment or information, and shall be sentenced and punished accordingly), when the act for which the accused is indicted is the same act for which he is convicted, the conviction of the lower degree is proper, although the indictment contains averments constituting the offense of the highest degree of the species of crime, and omits to state the particular offense and circumstances characterizing a lower degree of the same crime.
2. Under an information charging that plaintiff in error, being armed with a dangerous weapon, did make an assault upon another, with intent to murder, a verdict declared him guilty of an assault with intent to do great bodily harm, and he was thereupon adjudged guilty of the lesser offense. *Held*, that an assault with intent to murder embraces an intent to do great bodily harm, and hence the information sustained the conviction.

ERROR to review a judgment of the circuit court for Oneida county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

The plaintiff in error was tried at the May, 1902, term of the circuit court for Oneida county. He was duly arraigned on an information filed by the district attorney, charging "that on the 5th day of April, A. D. 1902, at said county, *John Birker,* being then and there armed with a dangerous weapon, to wit, a large pocketknife, did make an assault upon one Robert Hawthorne with said knife, with intent the said Robert Hawthorne to kill and murder." Upon the evidence

received on the trial, the court submitted the case to the jury with instructions and different forms of verdict, one of which was, "Guilty of assault with intent to do great bodily harm." The court substantially instructed the jury upon this phase of the case that they might find the plaintiff in error guilty of assault with intent to do great bodily harm, under the charge set forth in the information, if they should determine from the testimony that defendant did not intend to murder Hawthorne, but that he did intend to do him great bodily harm. The jury returned a verdict finding the plaintiff in error guilty of an assault with intent to do great bodily harm. Motions in arrest of judgment, to set aside the verdict, and for a new trial were properly made in behalf of plaintiff in error, as well as a request to the court to certify the case to this court, pursuant to sec. 4721, Stats. 1898. Plaintiff in error excepted to the instructions and forms of verdict submitted, and the rulings of the court on the motions and requests made in his behalf. Judgment was rendered and entered upon the verdict sentencing plaintiff in error to confinement in the state prison for the term of three years. To reverse that judgment, plaintiff sued out this writ of error.

The cause was submitted for the plaintiff in error on the brief of *Sam. S. Miller.*

For the defendant in error there was a brief by the *Attorney General* and *Walter D. Corrigan,* second assistant attorney general, and oral argument by *Mr. Corrigan.*

SIEBECKER, J. In *State v. Yanta,* 71 Wis. 669, 38 N. W. 333, this court held that an information charging assault with intent to kill and murder could not sustain a conviction of assault with intent to do great bodily harm. The decision rested mainly upon the opinion in *Kilkelly v. State,* 43 Wis. 604, wherein defendant was convicted of assault with intent to *maim and disfigure,* upon an information charging assault with intent to murder. It was properly held in the

*Kilkelly Case* that such conviction could not be sustained, because the lesser offense is not necessarily included in the greater. The decision was based, however, upon a rule of criminal procedure. The court says:

"Where offenses are included one within another, a person indicted for a higher one may be convicted for one below, provided the averment in the indictment, in form, charges the lesser offense as well. Thus one indicted in the usual form for murder may be convicted of manslaughter, because, if the averment that the killing was with malice aforethought be negatived or stricken from the indictment, there remains a sufficient charge of manslaughter. . . . Hence, on this information, the plaintiff in error may lawfully be convicted either of an assault with the felonious intent charged, or of a simple assault and battery, or of a mere assault."

The reasoning which controls this case goes rather to the form of the indictment or information, than to any distinctions in the nature and kind of offenses committed in the same transaction, as the basis for the procedure to be adopted upon the trial. The requirement to aver in form all of the different grades of offenses that include felonious intents which may be carved out of the same transaction does not appear to have been contemplated by the early legislation on the subject of criminal procedure in this state. Sec. 4695, Stats. 1898, was adopted in 1849, and has ever since been preserved in its original form as a part of the law. It provides:

"Whenever any person indicted or informed against for felony shall on trial be acquitted by verdict of part of the offenses charged in the indictment or information and convicted of the residue thereof, such verdict may be received and recorded by the court, and thereupon the person charged shall be adjudged guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such indictment or information, and shall be sentenced and punished accordingly."

In *State v. Mueller*, 85 Wis. 203, 55 N. W. 165, this court sustained a verdict of "guilty of an assault with the intent to commit the crime of rape" upon an information simply charg-

ing the crime of rape, for the reason that "the proof necessary to establish the greater crime establishes every element of the lesser," and that the lesser offense "was necessarily included within the crime charged in the information." In *Porath v. State,* 90 Wis. 527, 63 N. W. 1061, the court, referring to sec. 4695, Stats. 1898, says:

"This provision applies to the case of a single count in which the lesser offense is included in, or may constitute a part of, the greater one, of which the defendant has been acquitted."

The opinions expressed in *State v. Yanta* and *Kilkelly v. State, supra,* are clearly in conflict with those announced in the two cases last mentioned. The *Mueller* and *Porath Cases* rest upon the ground that the sufficiency of an information or indictment in cases where offenses are included one within the other should be determined with reference to the crime charged, on the principle that the greater charge includes the lesser. This follows because the offense springs from the same transaction, and the proof necessary to establish the greater offense establishes every element of the lesser. In *Keefe v. People,* 40 N. Y. 355, the court, in construing a statute of like import, says:

"The true construction of the statute is that, when the act for which the accused is indicted is the same act for which he is convicted, the conviction of the lower degree is proper, although the indictment contains averments constituting the offense of the highest degree of the *species of crime, and omits to state the particular offense* and circumstances characterizing a lower degree of the same crime."

This rule is followed in the decisions of many states as a well-established principle in the modern law of criminal procedure. *People v. Prague,* 72 Mich. 178, 40 N. W. 243; *State v. White,* 45 Iowa, 325; *State v. Schele,* 52 Iowa, 608, 3 N. W. 632; *State v. Collyer,* 17 Nev. 275, 30 Pac. 891; *State v. Johnson,* 3 N. D. 150, 54 N. W. 547; *Beckwith v. People,* 26 Ill. 500.

The information in the present case charges that the plaintiff in error, being armed with a dangerous weapon, did make an assault upon another with intent to murder. The verdict declares him guilty of an assault with intent to do great bodily harm. All the elements of the offense charged are found, except the particular intent to murder, but that the accused had a different intent, namely, the intent to do great bodily harm. It seems that an assault with intent to murder must, from the very nature of the acts constituting the offense, embrace an intent to do great bodily harm. It therefore follows that the offense of which plaintiff in error was convicted is necessarily included in the offense charged in the information, and we are of opinion that the information, as presented, sustains the conviction of an assault with intent to do great bodily harm. This conclusion overrules the case of *State v. Yanta, supra,* and modifies the case of *Kilkelly v. State, supra,* in so far as it was made the basis of the decision in the *Yanta Case.*

*By the Court.*—Judgment affirmed.

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LUTHER and others, Appellants, vs. THE C. J. LUTHER COMPANY and others, Respondents.

SAME, Respondents, vs. BOLENS, imp., Appellant.

*December 20, 1902—May 29, 1903.*

*Corporations: Rights of stockholders: Directors: Breach of duty: Issue of shares of stock to control corporation: Equity: Remedies: Waiver: Practice.*

1. On questions of corporate policy, the stockholders, subject to temporary control by the board of directors, have the ultimate right to decide according to majority vote.
2. A majority of a board of directors of an already established and going corporation, representing the one of two factions which

had the minority of the capital stock, availing themselves of the temporary constitution of the board, exercised the power thus vested in them to sell a quantity of unissued original stock to a confederate, for the purpose of placing in hands favorable to their policy a majority of the total corporate stock. No opportunity was given to all existing stockholders to take their proportionate share of such increase. *Held*, that such sale was a breach of duty of the participating directors, and conferred no rights upon the purchaser who knew of and participated in the unlawful act and purpose.

3. In such case, there being no circumstance of delay, acquiescence or change of position in innocent reliance upon the validity of the stock issued, equity should decree the invalidity of such stock and cancellation of the certificates; that upon surrender of such certificates the corporation should repay the amount paid for such stock, without interest, less dividends received; also that all elections of directors by use of such stock should be decreed invalid, as well as any election of the general officers by such illegally chosen board of directors, and that the participants in the wrongful transaction be enjoined from using such stock, or claiming or exercising any rights as officials.

4. In an action by stockholders of a corporation against the corporation and certain directors and stockholders, to set aside the issue and sale of corporate stock made by a majority of the board of directors to a friend, for the purpose of obtaining unlawful control of the corporation, the complaint alleged, among other breaches of duty by such directors, the taking out a patent by one director in his own name which ought to belong to the corporation. No issue was raised by the complaint as to the title to the patent, or relief in regard thereto prayed. Judgment was entered in the action requiring the director to transfer such patent to the corporation. *Held*, error, since the evidence relating to the patent was admissible, and apparently offered on other issues than the corporation's right to the patent, and the director was not thereby so placed that silence on his part could be deemed a waiver of objection to the trial, in that action, of title to the patent.

APPEALS from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The findings disclose substantially the following material facts: In 1897, *C. J. Luther* had been building up a trade in machines called "sickle grinders," made generally under

a patent to one Caysier, under which he had a state right, until in that year his sales had reached about 2,000 machines and his annual profits about $1,500. The machines had been made for him by the Gilson Manufacturing Company, engaged in foundry and ironworking business at Port Washington, and including amongst its stockholders all of the individual defendants. In 1897, it appearing that a machine of this character met a demand and could be sold at a substantial profit, but that *Luther* had not capital to fully develop it, and the owners of the Gilson Company being desirous of retaining and increasing the work for their factory in the manufacture of such machines, a corporation for the purpose of vending sickle grinders and the like was organized, upon a nominal capital of $25,000, called the *C. J. Luther Company.* Something over $5,000 in money was contributed for stock at par by those interested in the Gilson Manufacturing Company, and $1,000 by Luther, in addition to which there were issued 124 shares of $100 each for the patents and good will of *Luther's* business, which all parties agreed was worth $5,000, but the surplus, seventy-four shares, was distributed, one half to *Luther* and one half to the Gilson Company people, as a sort of promoters' bonus. The board of directors then created consisted of *C. J. Luther,* who was also president, *T. A. Boerner,* vice president and treasurer, and *Harry W. Bolens,* secretary. The business was quite successful, resulting in the manufacture and sale of some 15,000 machines in 1898 and some 19,000 in 1899; the detail of the machine manufactured being changed from time to time by reason of improvements that were made in the Gilson shops, either by *Bolens* or Gilson, or some of their employees, part of which were patented in the name of *Luther,* by consent of all, and others were embodied in a complete device patented in the name of Neuens, a patternmaker for the Gilson Company, and another in the name of *Bolens.* There seems to have been some degree of suspicion between *Luther*

on the one side and the members of the Gilson Company on the other, characterized on the part of the latter by the acquisition of patent rights which were held in individual names and withheld from the *Luther Company,* with the view that the Gilson Company should be in position at any time to take up the manufacture and sale of sickle grinders, and characterized on the part of *Luther,* in the year 1899, by the formation of a partnership of himself and brothers with Neuens, above mentioned, and the actual establishment of a competing business under the firm name of Luther Bros. & Neuens. Prior to August 6, 1899, a date when the trouble out of which this action arises crystallized, the board of directors and officers were as above stated, and the stock was held as follows: *Clarence J. Luther,* seventy shares; *George H. Luther,* twenty shares; *Charles Luther,* three shares; *Herbert J. Noyes,* ten shares; *Alida Nicholas,* two shares; and R. W. Nicholas, three shares—all of the above holders of a total of 108 shares being connected with and related to *Clarence J. Luther,* and permitting him to control the vote of their stock. The rest was held: Boerner Bros. Association, forty-nine shares; G. A. Boerner, six shares; H. C. Boerner, six shares; *T. A. Boerner,* six shares; *A. R. Boerner,* six shares; John Gilson, ten shares; and *Harry W. Bolens,* eleven shares—making 94 shares held by those interested in the Gilson Manufacturing Company. All of this stock seems to have been issued by mutual consent, and no question is raised as to its validity. In addition to this, an issue of four shares of stock, the validity of which is not seriously attacked, was made shortly after August 6th to *Harry W. Bolens,* for which he had formerly, and by mutual consent, subscribed, but which had never been issued to or paid for by him; also of five shares, which, against the protest of *Luther,* was made to one George H. Crowns shortly after August 6th in payment for a building lot in Port Washington; so that on August 6th there were, of undisputed stock, 202 shares, and of not seri-

ously disputed stock nine shares, leaving thirty-nine shares, unsubscribed and unissued, of the original stock. On August 6th *Arthur R. Boerner,* already a stockholder, made subscription for ten shares of stock at par. This subscription was protested against by *Luther,* who refused to join in the issue of certificate, and attempted to send the money back to *Arthur R. Boerner;* but, by vote of the other two members of the board of directors, it was issued to him, and a certificate was signed by *Bolens* as secretary and by *T. A. Boerner* as vice president. Shortly thereafter Luther offered to subscribe for eighteen shares of the remaining twenty-nine, and to pay therefor $120 a share. *Arthur R. Boerner* thereupon offered to take the whole remaining twenty-nine shares, and to pay $120 per share for eighteen of them and par for the balance. Against this, *Luther* protested, and under advice of counsel the plaintiffs made demand that they be permitted to take their proportionate part of any new stock to be issued; but the board of directors, meeting in adjourned meeting on August 14th, resolved that it was not for the best interests of the company that *C. J. Luther* should have control of a majority of the stock, that *Arthur Boerner* was a desirable member of the corporation by reason of his business ability and financial strength, and that his offer for the remaining twenty-nine shares of stock be accepted, and there be issued to him by the secretary and president or vice president, not only the ten shares for which subscription and payment had already been received, but also the remaining twenty-nine shares. *Luther,* as director, opposed this, but was outvoted, and the certificates were issued, signed by the vice president, for the reason that *Luther,* as president, refused to sign them. Thereafter, counter offers were made to sell out entire stockholdings by *Luther* and his party to the Gilson Manufacturing Company party, and by the latter to the former, which came to naught. *Luther* resigned as president and director.

The court finds as facts that while additional capital was

convenient to the company, it having occasion at times to need large credit and considerable financial backing from its stockholders, there was no special need of it; that as a matter of business policy the advisability of the sale might fairly be approved by the directors; that the conduct of *Luther* in establishing competing business and attempting to undermine the prosperity of the corporation fully justified the other directors in believing that his control of the corporation would be prejudicial to its welfare; that the true and dominant purpose inducing the issue of this stock by the directors, and the subscription and purchase thereof by *Arthur Boerner,* was in order to secure control and direction of the company and its business to the faction which we have characterized as the Gilson Manufacturing Company faction, as against *Luther* on the other side; that, if the directors had power so to do, they were justified in accepting the proposition of *Boerner* and in rejecting that of *Luther,* under the circumstances then existing. On October 17, 1899, the present action was commenced, praying judgment that all of the aforesaid subscriptions by *Arthur Boerner* for the stock of the *Luther Company* be adjudged void and of no effect; that the company be enjoined from accepting any subscriptions and from receiving any money or property as payment therefor, and from issuing any certificates, until the offer of these plaintiffs to subscribe for their proportionate share thereof shall have been accepted, and certificates of stock issued to them in the proportions specified; and meanwhile for temporary injunction. The complaint seems to have been accompanied by an order to show cause for temporary injunction, containing a restraining order that the *Luther Company* and the two directors and officers, *T. A. Boerner* and *Harry W. Bolens,* desist from accepting any subscriptions from any person, or payment upon any, and from isssuing any certificates, and from receiving at any election or stockholders' meeting any votes representing any of the stock unsubscribed and unissued on August

6th, and that *Arthur Boerner* desist from subscribing, paying for, receiving certificates, or attempting to vote any such stock. On October 24, 1899, plaintiffs' motion for a temporary injunction was denied, without prejudice, and the above-mentioned restraining order was set aside. Thereupon, on November 6th, at the regular time, the annual stockholders' meeting of the *C. J. Luther Company* was held. *C. J. Luther,* as stockholder, moved to exclude from vote the thirty-nine shares of stock held by *Arthur Boerner* as the result of the proceedings above mentioned. Vote being taken on this motion, the plaintiffs' 108 votes were cast in favor of it; the votes of 103 shares of stock, other than the thirty-nine in dispute, against the motion; and, against the protest of the plaintiffs, *Boerner's* controverted thirty-nine shares were allowed to vote, and voted against the motion, thus making a majority against it. The vote for directors developed the same figures. The 108 shares of stock held by the plaintiffs cast their votes for a board of directors comprised of *C. J. Luther, George H. Luther,* and George H. Crowns. All the other votes, aggregating 142, were cast in favor of *Arthur R. Boerner, Theodore A. Boerner,* and *Harry W. Bolens* as directors. The latter were declared chosen, and apparently are still acting in that capacity, supported therein by the same vote. Obviously, if the thirty-nine shares of stock held by *Arthur Boerner* had not been voted, there would have been a majority in favor of the Luther directors and against the defendant directors. After said meeting, the complaint was amended to set up the facts thereof and to pray further relief, vacating the election of said directors, correcting the minutes so as to show the election of the Luther directors, and requiring the defendant directors to turn over the control of the company books, records, etc., to the Luther directors, whom it asks should be adjudged to be the directors of the corporation. It also repeated the prayer that said stock subscription and certificates of stock held by *Arthur*

*Boerner* be adjudged void and canceled. Upon the findings the court adjudged that the board of directors, in August, 1899, were within their legal powers in accepting *Arthur Boerner's* subscriptions and in issuing stock to him, and accordingly denied all relief looking to the invalidating thereof; but also, upon a finding that a certain patent taken out in the name of *Bolens* had been taken at the expense of the company, and under an agreement by him that it should belong to the corporation, the court further adjudged that *Bolens* should assign such patent to the corporation. The plaintiffs appeal from all parts of this judgment except that which adjudges the corporate ownership of the patent, and predicate their appeal upon the findings, having settled no bill of exceptions and having filed no exceptions to the findings. The defendant *Bolens* appeals from that portion of the judgment requiring him to assign his patent to the corporation, and upon that appeal has brought up a bill of exceptions showing all the evidence, and his exceptions to the findings made by the court and to refusal of findings requested by the defendants.

For the plaintiffs there were briefs by *W. J. & J. H. Turner,* and *Turner, Pease & Turner,* and oral argument by *W. J. Turner.* They contended, *inter alia,* that the court erred in holding that the board of directors had authority to sell the thirty-nine shares of unissued stock to whosoever they pleased; and that the plaintiffs had no right to subscribe for the same in proportion to their holding. *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854; *Dousman v. W. & L. S. M. & S. Co.* 40 Wis. 418; *Putnam v. Sweet,* 2 Pin. 302; *Nazro v. M. Mut. Ins. Co.* 14 Wis. 295; Taylor, Corp. (5th ed.) § 569; *Humboldt D. P. Asso. v. Stevens,* 34 Neb. 528, 52 N. W. 568; *Jones v. C. & M. R. Co.* 67 N. H. 234; *Hammond v. Edison Illuminating Co.* (Mich.) 90 N. W. 1040; *Hite v. Hite,* 93 Ky. 257, 19 L. R. A. 173; 2 Thompson, Corp. § 2040; *Clark Co. v. Winchester & S. T. R. Co.* 19 Ky. Law

Rep. 1435, 43 S. W. 716; Cook, Stock & Stockholders (3d ed.) § 286; *Arkansas Agricultural Soc. v. Eichholts,* 45 Kan. 164, 25 Pac. 613; *St. Croix L. Co. v. Mittlestadt,* 43 Minn. 91, 44 N. W. 1079; 2 Beach, Pr. Corp. § 473; *Gray v. Portland Bank,* 3 Mass. 364, 3 Am. Dec. 156; *Terry v. Eagle Lock Co.* 47 Conn. 141; *Sewall v. Eastern R. Co.* 9 Cush. 5. The plaintiff had the right to maintain this action in equity without applying to the corporation to bring the action, because the action is one in favor of himself, the injury is to him as an individual committed upon him by the corporation. *Doud v. W. P. & S. R. Co.* 65 Wis. 108, 115; *Wood v. U. G. C. B. Asso.* 63 Wis. 9. The court had jurisdiction to render judgment against the defendant *Bolens,* to compel him to transfer to the corporation the patent taken out in his own name. *Valley I. W. Mfg. Co. v. Goodrick,* 103 Wis. 436; *Fuller & Johnson Mfg. Co. v. Bartlett,* 68 Wis. 73. In a suit in equity, where all are parties who can in any way be affected by the judgment, and whose rights can be subserved thereby, the court has the power to render such judgment as the protection of the rights of the various parties requires. *Franey v. Warner,* 96 Wis. 222, 237; *Turner v. Pierce,* 34 Wis. 658; *Winslow v. Crowell,* 32 Wis. 639; *Zimmerman v. Chambers,* 79 Wis. 20, 24.

For the defendants there was a brief, on the plaintiffs' appeal, by *James F. Trottman* and *H. B. Schwinn,* and separate briefs, on the cross appeal of defendant *Bolens* by *James F. Trottman* and *H. B. Schwinn,* attorneys, and *M. M. Riley,* of counsel; and the cause was argued orally by. *Mr. Trottman.* They contended, *inter alia,* that the rule requiring a ratable distribution of *new shares* where the capital is *increased* does not apply to the case where the corporation buys in the shares of its own *original* stock, and holds them as assets, or sells them for the payment of its liabilities or for the general benefit. 2 Thompson, Corp. § 2400; *State ex rel. Page v. Smith,* 48 Vt. 266, 289, 290. Nor does this

rule apply to the case where a part of the original capital stock was not subscribed or issued. *Curry v. Scott,* 54 Pa. St. 270; *State ex rel. Page v. Smith,* 48 Vt. 266; 1 Cook, Corp. § 286. The directors of a corporation have the power, in the ordinary and usual course of business, to dispose of that part of the original capital stock which has not been subscribed, and that power can be nowhere questioned so long as the directors act in good faith with honest motives. *Reese v. Bank,* 31 Pa. St. 78; 2 Thompson, Corp. § 2077, 7 Thompson, Corp. § 8470; *Hunter v. Roberts, Thorp & Co.* 83 Mich. 63, 47 N. W. 131; secs. 1773, 1776, Stats. 1898; *Calteaux v. Mueller,* 102 Wis. 525.

The following opinion was filed March 21, 1903:

DODGE, J. Were *Clarence J. Luther* the sole plaintiff, we should have little doubt that he ought to be dismissed from a court of equity without relief, for the reason that his own conduct has been so in outrage of his duties as a director and officer of the corporation that no court can patiently listen to his prayer for enforcement of fiduciary principles and duties. That objection does not, however, exist to some of the other plaintiffs, who, as stockholders, ask that their rights be protected as to them. The circuit court has found, and we find, nothing of misconduct in their relations to the company.

The salient facts presented by the findings are that the governing board of directors of this corporation were divided into two factions—*C. J. Luther* on the one hand, interested only in the profits which the corporation might make, and to that end interested that it should buy its supplies as cheaply as possible; on the other hand, *T. A. Boerner* and *H. W. Bolens,* largely interested in the company from which supplies were mainly purchased, and therefore anxious to have such purchases continue, and at prices profitable to the seller. Here was presented a question of corporate policy which the stockholders, subject to temporary control by the

directors, had the ultimate right to decide according to majority vote. In that situation, *Bolens* and *Boerner,* availing themselves of the temporary constitution of the board, exercised the power thus vested in them to sell a quantity of unissued stock to a confederate of theirs for the purpose of placing in hands favorable to their policy a majority of the total corporate stock. Such sale is attacked primarily on the ground that, in an already established and going corporation, an increase of capital stock, accomplished either by formal increase of the amount originally authorized or by issue of what had originally been withheld, though within the authorized amount, without first giving opportunity to all existing stockholders to take their proportionate shares of such increase, is wholly beyond the power, not only of the directors, but of any mere majority of stockholders. This doctrine rests on the idea that, while its own corporate stock is property, so that the sale and disposition thereof involve questions of business policy properly controllable by the directors' or stockholders' meeting, the original issue thereof involves something more; that the latter act goes to underlying organization—modifies the fundamental arrangement and proportions of the members. This doctrine is supported by overwhelming and almost unconflicting array of authority, from which we need cite but a few illustrative cases and text book discussions. Cook, Stockholders (3d ed.) §§ 284, 286, 662; 2 Beach, Pr. Corp. §§ 473, 474; 2 Thompson, Comm. Corp. § 2040; Taylor, Pr. Corp. (5th ed.) § 569; *Gray v. Portland Bank,* 3 Mass. 364; *Reese v. Bank of Montgomery Co.* 31 Pa. St. 78; *Electric Co. v. Edison E. I. Co.* 200 Pa. St. 516, 50 Atl. 164; *Jones v. C. & M. Railroad,* 67 N. H. 119, 38 Atl. 120; *Humboldt D. P. Asso. v. Stevens,* 34 Neb. 528, 52 N. W. 568; *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854; *Dousman v. Wis. & L. S. M. & S. Co.* 40 Wis. 418. It has not yet been decided in this state whether the reasons on which rests this rule of law are sufficient to impose such

limitation upon the powers of directors in our corporations, resting, as they do, upon sec. 1776, Stats. 1898, which provides that "the *stock,* property, affairs and business of every such stock corporation shall be under the care of and be managed by a board of directors," etc. The Minnesota court, in face of a similar statute, has held affirmatively. *Jones v. Morrison, supra.* The question will be worthy of careful consideration when its decision becomes necessary.

For the purposes of the present case, it is not necessary to consider the unissued stock otherwise than as mere property, over which the powers of the directors are the same as over any other assets of the corporation, namely, to sell to whom and at such prices as to them shall seem best for the corporation and all its stockholders, in the honest exercise of the discretion and trust vested in them. Even then, however, their duties with reference thereto are fiduciary; they are bound to act *uberrima fides* for all stockholders. To dispose of or manage property of the corporation to the end and for the purpose of giving to one part of their *cestuis que trustent* a benefit and advantage over, or at the expense of, another part, is breach of such duty, especially when the directors themselves belong to the specially benefited class. *In re The Taylor Orphan Asylum,* 36 Wis. 534; *Eschweiler v. Stowell,* 78 Wis. 316, 47 N. W. 361; *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 481, 494, 81 N. W. 1064; *Goodin v. Cincinnati & W. C. Co.* 18 Ohio St. 169; *Farmers' L. & T. Co. v. N. Y. & N. R. Co.* 150 N. Y. 410, 44 N. E. 1043. It cannot matter how this result is accomplished, nor what the form of the undue benefits conferred or acquired. The benefit to the one class or the injury to the other need not be pecuniary. While the ultimate purpose of most stock corporations is money profit, the right of proportionate voice and influence in selection of policy and method of accomplishing that result is most important to each shareholder. It is as fundamental and vital as the right of suffrage under a representa-

tive government. While a governmental act may not take away from any class of citizens property or physical liberty, yet if, contrary to the fundamental law of organization, it abates their suffrage, it would be held void. Each holder of a share of stock has the right that, by convincing the holders of a certain number of other shares, his policy of business be followed. Any invasion of that right is an injury to him which, from his point of view, may be greater than very considerable present money loss to the corporation. While this right must yield to a power over it given by the terms of the association, still he has the right to insist that such power shall be exercised for the purposes of the whole association. It is not so when exercised for the direct purpose of depriving him of his proportionate voice and influence. That is not a legitimate manner for those temporarily vested with power to perpetuate the policy which they favor. Nothing can be more fallacious in corporate or in popular government than the argument that because they honestly believe their policy right, and another dangerous, they may rightfully invade the field of the suffrage upon which policy rests, and disfranchise, in whole or in part, those who disagree with them. We have said this much of perhaps rather trite and elementary philosophy because the conclusions of the trial court seem to rest on the argument that, because the majority of the directors honestly considered *Clarence J. Luther's* control of corporate management dangerous, they might properly exert their power over unissued stock in order to colonize enough new votes to turn the majority supporting *Luther's* policy into a minority.

Since the trial court has found, and upon sufficient evidence, that the purpose of the sale of the new stock was to take from the faction supporting *Luther's* policy the control of the corporation, and to transfer it to the other faction to which the two directors perpetrating the act belonged, as did also the recipient of the stock, we must hold that such sale

was a breach of the duty of the directors, and could confer no rights upon the beneficiary, who knew and participated in the unlawful act and purpose.

That conclusion having been reached, the next question is as to what a court of equity should do in the premises. What form of remedy will accomplish rescission of the unlawful acts, and re-establish the *status quo* disturbed by means thereof? In some cases, where, at the time of decision, the issue and delivery of the stock was not complete, the remedy of declaring void the transaction and enjoining issue has sufficed. *Electric Co. v. Edison E. I. Co.* 200 Pa. St. 516, 50 Atl. 164; *Dousman v. Wis. & L. S. M. & S. Co.* 40 Wis. 418. It is also intimated, though on demurrer, that improperly issued stock may be adjudged canceled and the holder enjoined from voting thereon. *Wood v. Union G. C. B. Asso.* 63 Wis. 9, 22 N. W. 756; *Jones v. Morrison,* 31 Minn. 140, 16 N. W. 854. And finally, it has been held proper to adjudge the cancellation of the unlawful stock, and to enjoin from acting directors and officers who had been elected by voting it. *Humboldt D. P. Asso. v. Stevens,* 34 Neb. 528, 52 N. W. 568; *Reynolds v. Bridenthal,* 57 Neb. 280, 77 N. W. 658. We have not found any case in which a court has gone any further than as above stated.

In the present record we are embarrassed by no circumstances of delay or acquiescence on plaintiffs' part, nor of defendants' change of position in innocent reliance upon the validity of the stock issued. Plaintiffs gave full notice of their objections to the sale of the stock, and commenced this action, asserting its invalidity, and seeking to prevent defendants from recognizing it as giving any voting right to the holder, nearly a month before the stock meeting of November 6, 1899. We deem it clear, therefore, that the decree should declare the invalidity of the thirty-nine shares of stock issued by *Arthur R. Boerner* and adjudge their cancellation, and that upon surrender of the certificates the corporation

repay to him the amount paid for the stock, without interest, less any dividends received by him on that stock; also that the election of directors purporting to have taken place November 6, 1899, be adjudged void, and defendant *Arthur R. Boerner* be enjoined from in any wise claiming or exercising the office of director. Any election to either of the general offices of the corporation made by such illegally chosen board of directors should be adjudged invalid, and the persons so elected, if defendants, should be restrained from claiming or exercising any such office by reason of any such election. This will restore the situation as it existed before the unlawful acts complained of, and a stockholders' meeting can then be held to elect a board of directors. This, as already stated, is going as far as any of the decided cases which have come to our notice, and we think does substantial justice, without the drastic remedy of now endeavoring to install in office those whose claimed election occurred more than three years ago, and whose legal term of office would have expired long since if successors had been elected.

2. Upon defendant *Bolens'* appeal is assigned as error the adjudication that he transfer to the corporation a certain patent. That relief is obtainable, of course, only in an action by the corporation against the individual defendant, to which none of the other parties to this record are either necessary or proper parties, and in which none of them would have any direct interest. True, in case of refusal of the corporation to bring such an action, the present plaintiffs might bring it, but only in the right of the corporation. It would still be an action by it merely forced into court by the individuals in representative capacity. *Land L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964; *Jenkins v. Bradley,* 104 Wis. 540, 551, 80 N. W. 1025; *Boyd v. Mut. Fire Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171. Such an action cannot be joined with one brought by the plaintiffs in their own right to remedy or redress direct wrongs to them. The

two causes of action would not both belong to any one of the classes specified in sec. 2647, Stats. 1898, nor would they both affect all parties to the action, as required by that section. *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 481, 492, 81 N. W. 1064; *Boyd v. Mut. Fire Asso. supra; Pietsch v. Krause,* 116 Wis. 344, 93 N. W. 9. Hence, if the complaint containing the principal cause of action for cancellation of stock issued in derogation of plaintiffs' rights had also attempted to state a cause for recovery to the corporation of this patent, it would have been obnoxious to demurrer for multifariousness. It, however, contained nothing even suggesting such attempt. It does not declare two separate causes of action, as required by sec. 2647. It refers to *Bolens'* conduct with reference to this and other patents merely as part of the charge of fiduciary misconduct, and the prayer does not hint at any such relief as that granted against *Bolens;* hence there was no opportunity to raise the objection by demurrer.

Plaintiffs, however, urge two rules of practice, both well settled in this court: First, that although the complaint may fail to state a cause of action, nevertheless, if, by evidence permitted by defendant to go in without objection, the cause of action is proved, judgment may properly be rendered thereon, the complaint being amended, or deemed to be, so as to correspond with the proof; secondly, that, unless the objection to a complaint for multifariousness be raised by demurrer or answer, it is waived. Sec. 2654, Stats. 1898. These rules have been adopted to promote justice and to enable full decision of the merits of a controversy after they have been tried by consent of both parties. They are not intended, and will not be perverted, to deprive a defendant of his rightful defenses without his consent or some lapse of reasonable diligence. They proceed on the theory of waiver of the right which every defendant has to be informed intelligibly of the facts which the plaintiff claims to entitle him

to recover, as well as the right to have litigated a cause of action without the trial being complicated by the joinder of an incongruous one. Like all waiver predicated upon silence, however, there must have been reasonable opportunity, as well as omission, to object. When evidence is offered which is pertinent to the cause stated in the complaint, it naturally is assumed to be offered in support of the cause of action so stated, and mere omission to object to it cannot, with reason, be ascribed to defendant's willingness that some other and unstated cause of action be tried, to which also that evidence may be competent. *Mowatt v. Wilkinson,* 110 Wis. 180, 85 N. W. 661. The same considerations forbid any inference of consent that an incongruous cause of action may be joined, from omission to object by demurrer or answer, when the complaint seeks no such joinder. It is not until the plaintiff reasonably notifies defendant of his desire to make such joinder, either by offering evidence unambiguously tending to support such additional cause of action or by offer to amend, that the latter can be deemed by silence to consent thereto or waive objection. Demurrer for multifariousness could not have been sustained to this complaint, for it certainly does not state any separate cause of action for recovery of the patent from defendant *Bolens.* The duty to object did not arise upon introduction of evidence with reference thereto, for such evidence was admissible, and apparently offered upon the issue as to the relative fidelity, or the reverse, of *Luther* and *Bolens* to the corporate welfare. It is clear that defendant *Bolens* never was so placed that silence on his part could be deemed to waive objection to adjudication in this action of a right of the corporation to enforce the conveyance of this patent to it. Hence judgment to that effect must be reversed, and also all findings of fact on the issue thereby adjudicated, to the end that no estoppel by *res adjudicata* against either party may rise from this erroneous trial of an issue not presented to the court.

*By the Court.*—Judgment reversed on both appeals, and cause remanded, with directions to enter judgment in accordance with the foregoing opinion.

A motion for a retaxation of costs was denied May 29, 1903, SIEBECKER, J., taking no part.

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## THE STATE EX REL. GARRETT VS. FROEHLICH, Secretary of State.

*December 20, 1902—May 29, 1903.*

***Constitutional law: Keeley cure orders: Legislative appropriation to pay county orders issued under unconstitutional law: Public purpose: Taxation.***

1. Ch. 203, Laws of 1895, providing for the treatment (Keeley cure) of habitual drunkards in private institutions at the expense of the county in which each resided, was held unconstitutional and void, because it involved the imposition upon the respective counties of the state, without their consent, of a tax for the benefit of private institutions and individuals, not the legitimate objects of public charity. Thereafter ch. 468, Laws of 1901, was enacted. The later statute appropriated a fixed sum for the purpose of paying, *pro rata*, innocent purchasers of unpaid county orders issued under ch. 203, Laws of 1895, and issued before it had been declared unconstitutional. Relator, having brought himself within the provisions of ch. 468, Laws of 1901, on the refusal of the secretary of state to draw his warrant on the state treasurer to pay relator's claim, duly audited as required by ch. 468, Laws of 1901, brought *mandamus* to compel the drawing of such warrant. *Held*, that ch. 468, Laws of 1901, is unconstitutional; that thereby the legislature attempted to give away the public funds of the state to private parties, for the same private purposes which, under ch. 203, Laws of 1895, had been condemned, and that it was not an attempt to appropriate public funds raised by taxation for some object of public or common interest.
2. Sec. 1, art. VIII, Const., provides that the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe. Ch. 468, Laws of 1901, provided

an appropriation to pay, *pro rata*, innocent purchasers of county orders issued under ch. 203, Laws of 1895, before it had been declared unconstitutional. *Held*, that ch. 468, Laws of 1901, did not come within the constitutional rule of uniformity of taxation, since it is necessary, not only that the object of the appropriation should be public, but also that it should subserve the common interest and well-being of the people of the state.

3. Under sec. 5, art. VIII, Const., providing that the legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year, state taxes are only authorized to pay state expenses.

4. Under ch. 203, Laws of 1895, numerous private persons were treated for a disease (drunkenness), by certain private persons and corporations, under the supposition that the respective counties where the patients lived would pay for such treatment an amount not exceeding $130 for each. County orders issued therefor were declared void because ch. 203 was unconstitutional, in that it imposed a tax upon the counties, without their consent, for the benefit of private institutions and individuals, not the legitimate objects of public charity. Thereafter the legislature appropriated a sum of money, to be apportioned, *pro rata*, among the holders of such orders. *Held*, that such appropriation was essentially an appropriation from the general fund to pay private claims growing out of private transactions, and the fact that such orders had been transferred to innocent purchasers did not change the situation, or give the orders any greater validity.

MANDAMUS to the Secretary of State. *Alternative writ quashed.*

October 22, 1902, the relator filed in this court a petition for an alternative writ of *mandamus* to compel the defendant, as secretary of state, to draw a warrant on the state treasurer, payable to him, for $492.36, in the manner provided by ch. 468, Laws of 1901, or show cause to the contrary.

The petition alleges, in effect, that the relator was a resident and citizen of Eau Claire; that after the enactment of ch. 203, Laws of 1895, providing for the Keeley treatment and cure of inebriates, and during 1895, 1896, and 1897, one Dr. Montgomery established and maintained the Eau Claire Institute for such treatment of inebriates; that eight persons therein named were treated by such institute upon certified

orders of county judges at the expense of the respective counties sending them, as prescribed in that act; that the aggregate amount of the expense of such treatment of said eight persons was $815; that between September 10, 1895, and February 2, 1897, the relator sold and delivered to Dr. Montgomery merchandise and supplies to the amount of $815, and received in payment therefor an assignment from Dr. Montgomery of said orders for the commitment and treatment of such inebriates to the amount of $815, which orders are still owned by the relator, as an innocent purchaser thereof, and that they are wholly unpaid; that after the relator so purchased such orders and held the same, this court, on February 2, 1897, decided that ch. 203, Laws of 1895, was unconstitutional and void (*Wis. K. I. Co. v. Milwaukee Co.* 95 Wis. 153, 70 N. W. 68); that ch. 468, Laws of 1901, was enacted to reimburse, at least in part, the relator and other holders of similar orders for money so paid out and expended by them; that within sixty days after the publication of that act the relator filed with the secretary of state, state treasurer, and attorney general, as the auditing committee provided for therein, the said county orders so purchased by him, with full proof that he was such innocent purchaser; and the same were audited by such committee at $815; that several other persons holding similar orders so filed the same and made similar proof before the committee, and the same were audited by such committee; that all orders so filed with the committee and audited amounted in the aggregate to $49,658.44, which orders or claims should be paid *pro rata* out of the $30,000 appropriated by ch. 468, Laws of 1901, and that the relator's proportionate share thereof is $492.36; that the state treasurer has in his hands the $30,000 so appropriated, and the same has not been appropriated for any other purpose; that it is the duty of the secretary of state to draw his warrant on the state treasurer payable to the relator for his proportionate share of such appropriation, to wit,

$492.36, and the duty of the state treasurer to pay the same, but that the secretary of state has refused and still does refuse to draw such warrant, and the state treasurer still refuses to pay to the relator the amount stated, and that such refusals are upon the sole ground that ch. 468, Laws of 1901, is unconstitutional and void.

On such petition an alternative writ of *mandamus* was issued by this court as prayed October 22, 1902, and on November 11, 1902, the secretary of state, by E. R. Hicks, attorney general, appeared, and by way of return to the alternative writ of *mandamus* moved the court to quash the writ, for the reason that the facts stated were not sufficient to constitute a cause of action.

For the relator there was a brief by *Wickham & Farr* and *Ryan, Merton & Newbury,* and oral argument by *James Wickham* and *T. D. Ryan.* They contended, *inter alia,* that the state legislature has authority to exercise any and all legislative powers not delegated to the federal government, nor expressly or by necessary implication prohibited by the national or state constitution. *State ex rel. New Richmond v. Davidson,* 114 Wis. 583, 90 N. W. 1067; *N. W. Nat. Bank v. Superior,* 103 Wis. 43; *Wis. C. R. Co. v. Taylor Co.* 52 Wis. 60; *State ex rel. Tesch v. Von Baumbach,* 12 Wis. 310–313; *Overshiner v. State,* 156 Ind. 187, 83 Am. St. Rep. 187, 189; *State v. Narragansett,* 16 R. I. 424, 3 L. R. A. 295–298; *State ex rel. Hicks v. Stevens,* 112 Wis. 170, 172; Cooley, Const. Lim. 204. The legislative construction of the constitution, continued without question for a long number of years, has great weight in determining the constitutionality of the law. *State v. Gerhardt,* 145 Ind. 439, 33 L. R. A. 313–319; *State v. Narragansett,* 16 R. I. 424, 3 L. R. A. 295; *People ex rel. Mooney v. Hutchinson,* 172 Ill. 486, 40 L. R. A. 770–773; *Boyden v. Brookline,* 8 Vt. 286; *Bruce v. Schuyler,* 4 Gilman, 221, 46 Am. Dec. 447; *Maher v. State,* 1 Porter, 265, 26 Am. Dec. 379; 6 Am. & Eng. Ency. of Law

(2d ed.) 932, 933; *Dean v. Borchsenius,* 30 Wis. 236–246; *Cohens v. Virginia,* 6 Wheat. 264, 418; *Harrison v. State ex rel. Harrison,* 22 Md. 468, 85 Am. Dec. 658. The statute does not violate the provisions of sec. 2, art. VI, Const., which provides that the secretary of state shall be *ex officio* auditor. *State ex rel. Crawford v. Hastings,* 10 Wis. 525–530; *State ex rel. Sloan v. Warner,* 55 Wis. 271; *Martin v. State,* 51 Wis. 407; *State ex rel. Cornish v. Tuttle,* 53 Wis. 45; *C. & N. W. R. Co. v. Langlade Co.* 56 Wis. 614; *Lynch v. Steamer "Economy,"* 27 Wis. 69; 6 Am. & Eng. Ency. of Law (2d ed.) 1088. The proposition is not in violation of sec. 1, art. XIV, U. S. Const. *Davidson v. New Orleans,* 96 U. S. 97; *U. P. R. Co. v. U. S.* 99 U. S. 700; *U. S. v. Realty Co.* 163 U. S. 427. The proposition is supported by considerations that are sufficient to support a direct tax. *State ex rel. New Richmond v. Davidson,* 114 Wis. 583, 90 N. W. 1067; 17 Am. & Eng. Ency. of Law (2d ed.) 272; *People ex rel. Buckley v. Board of Police,* 63 N. Y. 623; *Soens v. Racine,* 10 Wis. 271, 281; *Lund v. Chippewa Co.* 93 Wis. 640, 652. A claim supported by moral obligation, or founded in justice and equity in the largest sense of those terms, or in gratitude or charity, will support a tax or appropriation. *Brodhead v. Milwaukee,* 19 Wis. 624; *State ex rel. McCurdy v. Tappan,* 29 Wis. 664; *Lafebre v. Board of Education,* 81 Wis. 660–667; *Lund v. Chippewa Co.* 93 Wis. 640–650; *State ex rel. New Richmond v. Davidson,* 114 Wis. 583, 90 N. W. 1067–1070; *New Orleans v. Clark,* 95 U. S. 644; *U. S. v. Realty Co.* 163 U. S. 427; *N. Y. Life Ins. Co. v. Board of Commissioners,* 99 Fed. 846; *Minneapolis v. Janney* (Minn.) 90 N. W. 312; Cooley, Taxation (2d ed.) 127, 128; *Friend v. Gilbert,* 108 Mass. 408; *Att'y Gen. v. Eau Claire,* 37 Wis. 400–408; *Allen v. Smith,* 173 U. S. 389; *Guthrie Nat. Bank v. Guthrie,* 173 U. S. 528; *Curran v. Holliston,* 130 Mass. 272; *State ex rel. Sayre v. Moore,* 40 Neb. 854, 59 N. W. 755; *Veazie v. China,* 50 Me. 518; *Mor-*

*ris v. People,* 3 Denio, 381; *People v. Budd,* 117 N. Y. 13; *Booth v. Woodbury,* 32 Conn. 118; *Guilford v. Board of Supervisors,* 13 N. Y. 143. The expenditure of money in the manner presented in the statute under consideration is not against the policy of the law. *Folschow v. Werner,* 51 Wis. 85; subd. 8, sec. 1038, Stats. 1898; *Board of Commissioners v. Lucas,* 93 U. S. 108; *Pearson v. State,* 56 Ark. 148, 35 Am. St. Rep. 91; *Mount v. State ex rel. Richey,* 90 Ind. 29, 46 Am. Rep. 192; *Board of Education v. McLandsborough,* 36 Ohio St. 227, 38 Am. Rep. 582.

The *Attorney General,* for the respondent, contended, *inter alia,* that inasmuch as payment of the Keeley cure orders could not be enforced by taxation, or because the object of such taxation was a private purpose, that the legislature could not accomplish the same object by indirection, namely, appropriating from the state funds for a private purpose money in the state treasury, and then replace it by taxation. *Spencer v. School District,* 15 Kan. 259–262; *Loan Asso. v. Topeka,* 20 Wall. 655–664; *Hooper v. Emery,* 14 Me. 375; *Bristol v. Johnson,* 34 Mich. 123; *Allen v. Inhabitants of Jay,* 60 Me. 124; *State ex rel. Griffith v. Osawkee,* 14 Kan. 418; *Wis. K. I. Co. v. Milwaukee Co.* 95 Wis. 153, 161.

The following opinion was filed March 21, 1903:

CASSODAY, C. J. Ch. 203, Laws of 1895, providing "for the treatment and cure of inebriates and persons addicted to the excessive use of drugs and other narcotics," was held to be unconstitutional and void, because it involved the imposition upon the respective counties of the state, without their consent, of a tax for the benefit of private institutions and individuals, not the legitimate objects of public charity. *Wis. K. I. Co. v. Milwaukee Co.* 95 Wis. 153, 158–160, 70 N. W. 68, 70. In that case it was said by the court:

"The act in question does not go upon the theory that the victim of such addiction is helpless and destitute, and hence the subject of public charity. It does treat such addiction as

a 'disease,' but it does not treat it as a contagious or infectious disease, and there is no allegation or claim that it is a contagious or infectious disease. The question recurs whether any county may be compelled to pay any private party for treatment, medicines, and board of any resident therein having a disease not contagious or infectious, merely because such diseased person 'has not the means to pay for said treatment.' If a county may be compelled to make such payment for such treatment, medicines, and board of a person having such a disease, then it logically follows that every county may be compelled to pay private parties for treatment, medicines, and board of any person having any disease, though not contagious nor infectious, provided the victim has not the present means of making such payment himself. We are clearly of the opinion that no such power exists."

The following cases are there cited, in which this court had previously held that the legislature had no power to compel or authorize a municipality to raise money by taxation for a purely private purpose: *Curtis's Adm'r v. Whipple,* 24 Wis. 350; *Whiting v. S. & F. du L. R. Co.* 25 Wis. 181; *State ex rel. McCurdy v. Tappan,* 29 Wis. 664, 684; *Atty. Gen. v. Eau Claire,* 37 Wis. 436. From this last case this quotation was made in the *Keeley Case* from the opinion of the court by Chief Justice RYAN:

"Taxation is the absolute conversion of private property to public use. And its validity rests on the use. In legislative grants of the power to municipal corporations, the public use must appear. . . . The legislature can delegate the power to tax to municipal corporations for public purposes only; and the validity of the delegation rests on the public purpose. Were this otherwise, as was said at the bar, municipal taxation might well become municipal plunder."

Thus, it appears that ch. 203 was declared to be unconstitutional upon the express ground that it compelled any county to pay out of the public moneys of the county, to a private party for a purely private purpose, a sum not exceeding $130 for every inebriate found therein and treated upon the order and certificate of the county judge thereof, as prescribed in

the act. The case was distinguished in the later case of *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 666, 667, 79 N. W. 422, 427, but it was there said by my Brother MARSHALL:

"No 'public purpose,' within any reasonable scope of the term, was discovered in the Keeley law. That was why it met the fate of legislation going beyond the boundaries of constitutional limitations. True, stress was put on the feature that the services of caring for the committed persons were performed by private agencies for private gain. But it was not decided that such feature alone was fatal to the law. The combination of it with the purely private service rendered showed that the entire scheme was private. . . . Stress was laid on the fact that, in order to enable a person to enjoy the benefits of the act, it was not requisite that he should be without means of paying therefor. Destitution as to present means—money in hand, as it were, to make such payment—was all that was required. It was thus demonstrated that there was an absolute absence of any public purpose whatever covered by the law."

In a still later case it was held by this court:

"Neither the county board nor any county officer has any authority, under our statutes, to incur any liability for medical treatment of a pauper to cure him of inebriety as a disease. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers." *Putney Bros. Co. v. Milwaukee Co.* 108 Wis. 554, 556, 557, 84 N. W. 822, 823.

In that case the inebriate was committed under ch. 203, Laws of 1895, and, following *Wis. K. I. Co. v. Milwaukee Co.* 95 Wis. 153, 70 N. W. 68, it was held "that no liability arose by reason of the commitment;" but it was there contended "that it was the duty of the county to relieve and care for" the victim, "under sec. 1517, Stats. 1898, and when this task had been performed by a private person, . . . the county" should be held "liable if its officers knew of the facts and made no objection, and the pauper had been restored to health." In the opinion of the court by my Brother WINSLOW it is said:

"The doctrine here invoked is that of ratification or estoppel. . . . The claim here is not for ordinary relief or care, but for the medical treatment of a pauper for what is termed 'inebriety,' his board being simply a minor incident of the treatment. Neither the county board nor any county officer has authority under any specific statute to contract with a private person or corporation for such treatment, and entail a liability therefor upon the county. Inebriates may, indeed, be received into county asylums under certain restrictions, . . . and may be committed to a county poorhouse, . . . and the county become liable for their care in whole or in part, but the statutes seem to go no further."

Then, after stating that the legislature had "provided certain methods whereby inebriates and habitual drunkards" might be dealt with, and thereby excluded other methods, it was further said:

"There was, therefore, no authority resting in any officer or public body to incur the liability here claimed in the first instance. Such being the case, there can be no ratification by the county. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers." See, also, *Juneau Co. v. Wood Co.* 109 Wis. 330, 333, 334, 85 N. W. 387.

Having thus held that ch. 203, Laws of 1895, was unconstitutional and void on the ground that the legislature had no power to compel a county to give away its public funds to private parties for purely private purposes, the question recurs whether the legislature has power to give away the public funds of the state to private parties for the same private purpose by the enactment of ch. 468, Laws of 1901.

The act, in terms, appropriates $30,000 "for the purpose of paying all innocent purchasers of county orders issued under an invalid law known as chapter 203 of the Laws of 1895, by different county judges of the state of Wisconsin which are yet unpaid and which were purchased prior to the date of the decision of the supreme court of the state of Wisconsin holding said act [ch. 203, Laws of 1895] unconsti-

tutional." It appears from the relation that claims which arose under the act, and prior to the decision mentioned—a period of 21½ months—had been filed, proved, and audited to the amount of $49,658.44. The facts stated sufficiently suggest the importance of that decision without any speculation as to what would have been the effect upon the taxpayers of the several counties in the state, had the court held ch. 203, Laws of 1895, to be valid instead of being unconstitutional and void. The gravity of the case at bar would seem to be of far greater importance, because more far-reaching in its application. Counsel for the relator contend that "there is nothing in the constitution providing that the legislature may make appropriations only for public purposes." And then, after admitting "that there are several specific limitations on the power of the legislature to appropriate money," counsel assert that there is "no general limitation confining appropriations either to public purposes or legal obligations of the state." Counsel seemingly realize that it is essential to maintain these propositions in order to maintain this action. If these propositions are sound, then Chief Justice RYAN was in grave error when he made the statement above quoted, from his opinion in the *Eau Claire Case* cited. If such propositions are sound, then Chief Justice DIXON was wrong in declaring, as he did:

"The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the *community required to contribute.*" *Brodhead v. Milwaukee,* 19 Wis. 652. See, also, cases cited from the supreme court of Pennsylvania in the *New Richmond Case,* 114 Wis. 576, 90 N. W. 1067.

Mr. Cooley declares: "It is implied in all definitions of taxation that taxes can be levied for public purposes only." Cooley, Taxation (2d ed.) 103–105. And again: "Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and, as all are alike protected, so all alike should bear the burden in proportion to the interests secured." Cooley, Const. Lim. (6th ed.) 608.

Mr. Dillon states the rule thus: "It may be regarded as a settled doctrine of American law that no tax can be authorized by the legislature for any purpose which is essentially private, or, to state the proposition in other words, for any but a public purpose." 1 Dillon, Mun. Corp. (4th ed.) § 508. And again: "We may readily conceive of acts of the legislature demanding sacrifices which could not be sustained as legitimate exercises of the taxing power, although no specific provision of the constitution should be infringed." 2 Dillon, Mun. Corp. (4th ed.) § 737. And again: There can be no legitimate taxation to raise money unless it be destined for the uses or benefit of the government, or some of its municipalities or divisions invested with the power of auxiliary or local administration. A public use or purpose is of the essence of a tax." Id. § 736.

In *State ex rel. New Richmond v. Davidson,* 114 Wis. 574, 90 N. W. 1067, numerous cases are cited from this and other courts, to the effect "that the taxing power of the state can only be exercised for some object of public or common interest." It is there said:

"These adjudications, and many others which might be cited, seem to be based upon the broad ground that from the very nature of our state government there is running through our constitution an implied prohibition against forcing our citizens, by way of taxation, to contribute to any mere private purpose or enterprise, and that the determination of the legislature upon the subject is not absolutely conclusive upon the courts."

If the contention of counsel referred to is correct, then the decision of this court in that case is all wrong, and ought to be overruled. If the decision is right, then the contention of counsel, in the particular mentioned, is without foundation. The appropriation for the relief from the terrible calamity caused by the cyclone which struck New Richmond June 12, 1899, was sustained only on the ground that the object of the appropriation was public, and such as to subserve the common interest and well-being of the people of the state at large. In that case it was virtually conceded that the object of the appropriation was public. In considering whether the appropriation was repugnant to that clause of the constitution which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe" (sec. 1, art. VIII, Const.), it was said:

"If the object of the appropriation in question was purely local to the city of New Richmond, then the rule of uniformity would require the tax to supply the same to be limited to that municipality. If, however, the contribution was to subserve the common interest and well-being of the people of the state, then the appropriation was legitimate." *State ex rel. New Richmond v. Davidson,* 114 Wis. 578, 90 N. W. 1067, citing *State ex rel. McCurdy v. Tappan,* 29 Wis. 664, and *Lund v. Chippewa Co.* 93 Wis. 647, 67 N. W. 927.

In this last case it was said:

"This provision manifestly requires such uniformity, in case of a state tax, to extend throughout the state; in case of a county tax, to extend throughout the county; in case of a city tax, to extend throughout the city; and, in case of a town tax, to extend throughout the town. In other words, the rule of uniformity is not broken merely because a town or city or county raises a special tax for local purposes."

To come within the rule of uniformity, as thus defined, it is necessary, not only that the object of the appropriation in question should be public, but also that it should subserve the common interest and well-being of the people of the state.

There is another clause of the constitution, which declares:

"The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year." Sec. 5, art. VIII, Const.

Special stress was placed upon that provision in the *New Richmond Case,* 114 Wis. 578, 90 N. W. 1067. It was there said:

"To that language must be applied the well-known maxim, '*expressio unius est exclusio alterius.*' That construction limits such annual tax to an amount sufficient to defray such estimated expenses. . . . State taxes are thus only authorized to pay state expenses, or such expenditures as are authorized by the constitution."

The only reference to that provision of the constitution in the brief of counsel is in stating that that and other sections therein referred to "place limits on the power of the legislature to contract debts;" and from that we are asked to infer that the legislature is at liberty to give away the public moneys for objects concerning which it has no power to contract debts. While the provision quoted, like most of the provisions of the constitution, is affirmative in form, yet the manifest purpose is to limit the annual tax to an amount "sufficient to defray the estimated expenses of the state for each year." As held in the *New Richmond Case,* in order for an appropriation to be valid, it must be for a public purpose, and such as subserves the common interest and well-being of the people of the state. The act in question does neither. It was solemnly adjudged that ch. 203, Laws of 1895, was for the sole benefit of private parties and for private purposes. Counsel invoke the rule stated by Chief Justice DIXON, and quoted approvingly in the *New Richmond*

*Case,* wherein it is said: "Claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax." *Brodhead v. Milwaukee,* 19 Wis. 624; Cooley on Taxation, 127, 128; *State ex rel. New Richmond v. Davidson,* 114 Wis. 579, 90 N. W. 1067. That language was used with reference to the validity of an act of the legislature empowering the qualified electors of each town, city, or incorporated village to raise, by tax, money to pay bounties to volunteers who might enlist therefrom. The moral obligation of such municipality to pay such bounties to such volunteers was strong, and rested upon the parties required to pay, and was for an object confessedly public; and yet in that case it was expressly held:

"The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. . . . The objects for which money is raised by taxation must be *public,* and such as subserve the common interest and well-being of the community required to contribute."

There was no intention, in the language quoted, to justify a tax for every claim which one private party may have against another private party, though "founded in equity and justice . . . or in gratitude or charity." Here, numerous private persons were treated, under ch. 203, Laws of 1895, for a disease, by certain private individuals or corporations, under the supposition that the respective counties where the inebriates lived would pay for such treatment an amount not exceeding $130 each. The court held the act to be void, and the county under no obligation to pay such private party for such private purpose. The only change in the situation is that such void claims have been transferred by such private parties to "innocent purchasers." Wherein they are any more innocent than the persons or corporations furnishing the treatment it is difficult to perceive. Certainly, such transfer did not change the private purpose into a pub-

lic purpose—much less did it make the claim which one private party had against another private party a claim founded in equity and justice, or in gratitude or charity, against the whole state. By ch. 203 the legislature only attempted to create claims against the counties. Notwithstanding the transfer, the claim still remains a private claim, founded upon a private transaction. The appropriation is less than the amount of the aggregate claims; but by its terms each claimant is to have a *pro rata* share. It is essentially an appropriation from the general fund to pay numerous private claims growing out of private transactions. All taxpayers of the state are interested in preserving the funds of the state from illegal diversion or spoliation. *State ex rel. Raymer v. Cunningham,* 82 Wis. 39, 51 N. W. 1133.

If the decisions of this court are to be followed, and have the significance above ascribed to them, then there would seem to be no escape from a condemnation of the enactment in question. Counsel for the relator seem to rely with great confidence upon the decision in *U. S. v. Realty Co.* 163 U. S. 427, where a claim was made for sugar bounty, under an act of March 2, 1895, 28 U. S. Stats. at Large, 933, appropriating money to certain persons who had incurred expense in the production of sugar on the faith and credit of certain acts of Congress passed five years before, the constitutionality of which had been questioned and the acts afterwards repealed. The court held:

"It is within the constitutional power of congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can *rarely, if ever,* be the subject of review by the judicial branch of the government."

It will be observed that the court had expressly declined to determine whether such prior acts of Congress were valid

or not; and that question never was determined. 163 U. S. 433, citing *Field v. Clark,* 143 U. S. 649. If they were unconstitutional, it was simply because Congress had exceeded its powers upon a subject rightfully delegated to it. The opinion of the court in that case refers to no state adjudication, except *Town of Guilford v. Chenango Co.* 13 N. Y. 143, 146, 149; (163 U. S. 443.) That case involved the validity of an act of the legislature requiring the town to reimburse its officers for moneys expended by them in fruitless litigation. The court decided that the constitution contained no clause prohibiting such an enactment. On the contrary, both opinions refer to the provisions of the constitution, then in force, regulating the method of passing such enactments, and, among others, one which declared that: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property *for local or private purposes.*" Sec. 9, art. I, Const. N. Y. 1846. And one of the opinions states that such provisions were "not limitations of the absolute power of the legislature over the public moneys, or of the like power in the imposition of taxes, but rules prescribing the manner of its exercise." And Judge DENIO said: "There is no question but that this law received the requisite vote." In a later case in New York, that case was distinguished and limited, and the court held:

"The legislative power of taxation, at least as regards the purposes for which it is to be exercised, is not without limit, and it is within the province of the courts to examine and to determine whether, in a particular case, the extreme boundary of legislative power has been reached and passed. It must be made quite clear, however, that the legislature has erred before the court can interfere with its action. The legislature has not power to authorize a municipal corporation to issue its obligations for the purpose of raising money wherewith to pay a subscription of said corporation to the capital stock of a private corporation, and to provide for the

payment of such obligations by taxation. It has not power to tax for private purposes solely." *Weismer v. Douglas,* 64 N. Y. 91.

Such distinctions are not referred to in the opinion of the court in *U. S. v. Realty Co.* 163 U. S. 427, notwithstanding the learned justice who wrote it had long been an honored member of the court of appeals of New York. Probably he deemed such distinctions immaterial to the decision of the case then in hand. Assuming that the decision in that case goes to the extent claimed for by it by counsel, and with great respect for the court from which it emanates, yet, in view of the provisions of our own constitution, and the decisions, cited, and the general trend of authority in this country, we should be unwilling to follow it.

*By the Court.*—The motion to quash the alternative writ of *mandamus* is granted, and the relation is dismissed.

Mr. Justice BARDEEN was present at the hearing of this case, and participated and concurred in the decision thereof, which was made December 30, 1902.

WINSLOW and DODGE, JJ., dissent.

A motion for a rehearing was denied May 29, 1903, SIEBECKER, J., taking no part.

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GIBBS, Appellant, vs. SEIBT and others, Respondents.

*February 5—May 29, 1903.*

*Appeal and error: Affirmance or reversal: Divided court.*

**Where the supreme court is equally divided, the judgment of the trial court is affirmed.**

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Cate, Lamoreux & Park,* and oral argument by *A. L. Sanborn.* They contended, *inter alia,* that the promise of the plaintiff that he would not enforce the judgment that he had purchased by a sale of the premises was not void for want of consideration. 3 Pomeroy, Eq. Jur. § 1235; 1 Beach, Eq. Jur. § 291; *Pinch v. Anthony,* 8 Allen, 536; *Ketchum v. St. Louis,* 101 U. S. 306, 317; *Phelan v. Fitzpatrick,* 84 Wis. 240; *Buchan v. Sumner,* 2 Barb. Ch. 165, 194; *Fletcher v. Morey,* 2 Story, 555, 566; *Paine v. Wilcox,* 16 Wis. 202–214; *Daniels v. Lewis,* 16 Wis. 140; *Cutler v. Babcock,* 81 Wis. 203; *Seaman v. Ascherman,* 51 Wis. 678; Clark, Contracts, 76–78, 180; *Spear v. Evans,* 51 Wis. 42; *Sweet v. Mitchell,* 15 Wis. 641; *Spencer v. Fredendall,* 15 Wis. 666; *Starks v. Redfield,* 52 Wis. 349; *Farwell v. Wilmarth,* 65 Wis. 162; *Cumps v. Kiyo,* 104 Wis. 662; *Chapin v. Merrill,* 4 Wend. 657; *Young v. French,* 35 Wis. 111; *Hewitt v. Currier,* 63 Wis. 386; *Lent v. Padelford,* 10 Mass. 230; 1 Pingree, Mortgages, § 520; 1 Jones, Mortgages, § 610; 1 Beach, Contracts, § 170; *Lipsmeier v. Vehslage,* 29 Fed. 175; *Fraser v. Backus,* 62 Mich. 540, 29 N. W. 92; *Marshall v. Old,* 14 Colo. App. 32, 59 Pac. 217; *Maxwell v. Graves,* 59 Iowa, 613, 13 N. W. 758; *Cleveland v. Farley,* 9 Cow. 639; *Farley v. Cleveland,* 4 Cow. 432; *Calkins v. Chandler,* 36 Mich. 320; *Minneapolis L. Co. v. McMillan,* 79 Minn. 287, 82 N. W. 591; 3 Am. & Eng. Ency. of Law (2d ed.) 836; 1 Randolph, Commercial Paper, § 491; *Mygatt v. Tarbell,* 78 Wis. 351, 85 Wis. 465, 466. The plaintiff had, at all times after he purchased the judgment, the clear right to enforce the same, and his parol agreement not to enforce the same made no difference and constituted an equitable mortgage. *Boorman v. Wis. R. E. Co.* 36 Wis. 207; *Hoyt v. Fass,* 64 Wis. 273; 13 Am. & Eng. Ency. of Law, 679, note 1; *Spear v. Evans,* 51 Wis. 44; 2 Jones, Mortgages, § 1888; *Jarvis v. Dutcher,* 16 Wis. 307.

Plaintiff's right of action had never been barred by the statute of limitation. *Waldo v. Rice,* 14 Wis. 286; *Spear v. Evans,* 51 Wis. 42; *Carson v. Cochran,* 52 Minn. 67, 53 N. W. 1030; Wiltsie, Mortgages, §§ 58, 62, 72, 410; 2 Freeman, Judgments, § 434; sec. 2916, Stats. 1898; *Lane v. Salter,* 51 N. Y. 1; *Boorman v. Wis. R. E. Co.* 36 Wis. 207; *Hoyt v. Foss,* 64 Wis. 273.

For the respondents the cause was submitted on the brief of *Brennan & Cornelius.* They contended, *inter alia,* that the promise of the plaintiff that he would not enforce the judgment by sale of the premises in question, was void for want of consideration, and that the plaintiff had at all times a clear right to enforce the same. 6 Am. & Eng. Ency. of Law (2d ed.) 752–754; *Deacon v. Gridley,* 15 C. B. 295; *Farmington v. Bullard,* 40 Barb. 512; *Austin R. E. & A. Co. v. Bahn,* 87 Tex. 582; *Russell v. Buck,* 11 Vt. 166; *Parmelee v. Thompson,* 45 N. Y. 58.

The following opinion was filed March 21, 1903:

Cassoday, C. J. It appears from the record that February 9, 1875, the defendants, *Henry Seibt* and wife, gave to the plaintiff a note and mortgage on the premises described for $315. February 14, 1876, the plaintiff transferred the same to Olive A. Crosby. Mrs. Crosby foreclosed the note and mortgage, and April 11, 1878, obtained a judgment of foreclosure and sale thereon. December 6, 1879, the plaintiff, at the request of the mortgagor, purchased the judgment, with the understanding and agreement that the mortgagor should have further and reasonable time to pay the same. The mortgagor paid thereon from time to time $385.45, including $69.85 paid as principal thereon March 24, 1882. The last two payments of interest were made in 1900.

This is an action to foreclose the judgment and the parol agreement as an equitable mortgage. A demurrer *ore tenus* was sustained, and judgment was thereupon rendered dis-

missing the action. Mr. Justice WINSLOW and Mr. Justice DODGE think the judgment should be affirmed. Mr. Justice MARSHALL and I think it should be reversed.

*By the Court.*—The court being equally divided, the judgment of the circuit court is necessarily affirmed.

The appellant moved for rehearing.

*Cate, Lamoreux & Park,* attorneys, and *A. L. Sanborn,* of counsel, for the motion.

*Brennan & Cornelius, contra.*

The motion was denied May 29, 1903.

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MOREY, by guardian *ad litem,* Appellant, vs. LAKE SUPERIOR TERMINAL & TRANSFER RAILWAY COMPANY, Respondent.

*February 26—May 29, 1903.*

*Appeal and error: Divided court: Affirmance or reversal.*

Where the supreme court is equally divided, the judgment of the trial court is affirmed.

APPEAL from an order of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the complaint, in an action to recover compensation for personal injuries. The circumstances of the injury upon which liability is claimed are that on the occasion in question defendant was operating its train at a speed of twenty miles per hour, whereas the legal limit of speed was fifteen miles per hour, without giving signals of the approach to the street crossing where the injury occurred as the law requires; that

*Ray Rockwell Morey,* the person injured, a boy of about twelve years of age, while traveling south upon such street, where it was crossed by defendant's tracks, intending to proceed to his home on the opposite side thereof, when about thirty-nine feet from the particular track on which he was injured, such point, on account of obstructions to a view to the west, being the first place where he could see a train approaching from that direction if one was in view and in dangerous proximity to his pathway, he looked in such direction, having a clear view of the track to the west for a distance of about half a block from his place of crossing; that there was no train in sight; that he then looked east, keeping on his course till he reached a point about three and one-half feet from the place of injury, when he again looked west and saw a train about thirty-five feet away, coming at such a furious rate of speed as to cause him to be overcome with a sense of fear and to lose his presence of mind and self-control, and to thereby fall toward the track, whereby his left foot was unavoidably placed over the north rail thereof, where it was immediately struck by the train and severed from his leg. Defendant demurred to the complaint for insufficiency. The demurrer was sustained.

*Victor Linley,* for the appellant.

For the respondent there was a brief by *J. A. Murphy* and *Heber McHugh,* and oral argument by *Mr. McHugh.*

The following opinion was filed March 21, 1903:

MARSHALL, J. In this case the members of the court taking part in considering the questions involved being equally divided in respect thereto, the order appealed from must be affirmed *ex necessitate.* The Chief Justice and the writer concur in views harmonizing with the decision of the lower court, while Justices WINSLOW and DODGE are of a different opinion. In view of that situation it is deemed

best not to file an opinion upon the principles of law applicable to the cause.

*By the Court.*—The order appealed from is affirmed.

A motion for a rehearing was denied May 29, 1903, SIEBECKER, J., taking no part.

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FEHRMAN, Appellant, vs. TOWN OF PINE RIVER, Respondent.

*April 17—May 29, 1903.*

*Highways: Negligence: Personal injuries: Proximate cause: Special verdict: Inconsistent answers: Instructions to jury: Weather.*

1. The rule of the common law that a duty performed without negligence cannot be the proximate cause of an actionable injury to another applies to injuries happening on highways, although the liability therefor is dependent upon statutory provisions.
2. In actions for injuries happening on a highway, where the jury find, in answer to one question of a special verdict, that the highway in question was in a reasonably safe condition for travel, and, in answer to other questions, that the condition of the highway was the proximate cause of plaintiff's injury which the authorities should have foreseen, the answers are fatally inconsistent, and cannot support a judgment for defendant.
3. In actions arising from injury happening on defective highways, it is proper to instruct the jury, both on the questions of insufficiency and proximate cause, that they may and should consider whether the condition of the highway was such that an injury to an ordinarily prudent traveler thereon would be the natural and probable result, and ought reasonably to have been foreseen and anticipated by reasonably prudent officers in the discharge of their duty.
4. In actions arising from injuries happening on a defective highway, while the state of the weather may affect the question whether officials have exercised reasonable diligence in discovering defects and remedying them, and to that extent be the proper subject of instruction to the jury, it is error to charge the jury that they can consider it upon the abstract question of the reasonable safety of the highway at a given time.

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

This is an action to recover for personal injuries received by the appellant upon an alleged defective highway in the defendant town. The answer denies all the allegations of the complaint, and alleges contributory negligence as a defense. The evidence which was given on the trial is not preserved in the bill of exceptions. The following special verdict was rendered:

"1. Was the defendant, at the time of the accident complained of, a legally organized town of said county, and was the highway, at the point of the accident, one of the public highways of said town? *Answer* (by the court): Yes. 2. Was the plaintiff injured on the 6th day of December, 1900, at the time and substantially at the place alleged in the complaint? *A.* 2. Yes. 3. If you answer question number 2 yes, then was the said highway, at the time and place of plaintiff's said injury, in a reasonably safe condition for public travel thereon by persons in the exercise of ordinary care? *A.* 3. Yes. 4. Was the condition of the highway at the time and place of the plaintiff's injury the proximate cause of the injury to the plaintiff? *A.* 4. Yes. 5. Did the town authorities know of the condition in which the highway was at the place of the plaintiff's accident, or ought they, in the exercise of reasonable diligence, to have known of the same in time to have, in the exercise of reasonable diligence, repaired the same before the accident? *A.* 5. Yes. 6. Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injury? *A.* 6. No. 7. If the court shall be of the opinion that the plaintiff is entitled to a judgment, on this special verdict, at what sum do you assess his damages? *A.* 7. $400.00."

A motion on the part of the plaintiff for a new trial was overruled, and judgment rendered for the defendant upon the verdict, from which the plaintiff appeals.

For the appellant there was a brief by *Van Hecke & Smart,* and oral argument by *E. M. Smart.*

For the respondent there was a brief by *M. G. Hoffman,*

attorney, and *Curtis & Reid,* of counsel, and oral argument by *A. H. Reid.*

WINSLOW, J. By their answer to the third question of the special verdict the jury found, in legal effect, that the town officers had performed their whole duty and made a reasonably safe highway, and by their answer to the fourth and sixth questions they found, in legal effect, that the condition of the highway was such that it proximately caused an injury to a traveler thereon who was exercising ordinary care. The question presented is whether these findings can stand together, or whether they are so radically at variance that the verdict should have been set aside as inconsistent.

In any ordinary action for personal injuries based upon the alleged failure of duty or negligence of another, the question would hardly be considered a debatable one. To say that a given act is not negligent, but that it is the proximate cause of an actionable injury to another, is to say that it is negligent and that it is not negligent in one breath. It is a plain contradiction, for the reason that any act of human agency which is the proximate cause of an actionable injury to another must be a negligent act, or a failure in a duty, which is equivalent to negligence. If a man simply performs his duty without negligence, his acts cannot be the proximate cause of an actionable injury to another. Thus, in *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764, where the subject of proximate cause was exhaustively considered, it was said:

"It is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

That the question of proximate cause is necessarily present in every case of personal injury where damages are claimed

of another, by virtue of common-law principles, cannot be doubted. No good reason is perceived why the same principle does not apply to cases of highway injuries like the present, although the liability in such cases is based upon statutory provisions. The cases which apply the principle either expressly or impliedly to highway injuries are numerous. *Houfe v. Fulton,* 29 Wis. 296; *Kelley v. Fond du Lac,* 31 Wis. 179; *Chamberlain v. Oshkosh,* 84 Wis. 289, 54 N. W. 618; *McClure v. Sparta,* 84 Wis. 269, 54 N. W. 337; *Oliver v. La Valle,* 36 Wis. 592; *Stewart v. Ripon,* 38 Wis. 584; *McFarlane v. Sullivan,* 99 Wis. 361, 76 N. W. 559, 75 N. W. 71; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; *Donohue v. Warren,* 95 Wis. 367, 70 N. W. 305; *Seaver v. Union,* 113 Wis. 322, 89 N. W. 163. Indeed, it does not appear that the idea that there is any difference between highway cases and other negligence cases, as to the application of the doctrine of proximate cause, has ever been suggested. It would certainly be a new departure to hold at this late day that the principle does not apply to highway cases; a departure which could only be justified by the most cogent and convincing reasons, and we find no such reasons present.

But while the question is necessarily involved in every highway case, it is nevertheless true that in many such cases it may not be necessary to formally submit it to the jury. Thus, if it be found by the jury that a dangerous declivity has been negligently permitted to exist in a highway, and that a traveler has fallen therefrom while exercising ordinary care, and no other cause for his fall is disclosed by the evidence, proximate cause may be rightly said to be shown as matter of law by these facts. Where an open pit is left in a street on which the public are invited to travel, it would be foolish to say that the fall of a traveler into it was not a natural and probable result, and ought not to have been anticipated by reasonable men. *Crouse v. C. & N. W. R. Co.* 102 Wis. 196, 78 N. W. 446. But this is not saying that the

question of proximate cause is not in the case; it is only saying that the facts, either proven without dispute or found by the jury, settle the question so conclusively as to render a separate finding of the jury unnecessary. On the other hand, the evidence may show an insufficiency in the highway as matter of law, and it may appear that a traveler was injured thereby without contributory negligence, and yet it may be absolutely essential that the question of proximate cause be submitted to the jury. Thus, in *McFarlane v. Sullivan,* 99 Wis. 361, 74 N. W. 559, 75 N. W. 71, where it appeared that a man was driving along the highway and one of his lines suddenly broke, and the horse on that account turned to the side of the highway and ran the buggy against a large stone, it was held that the breaking of the line was the proximate cause of the injury, and not the stone in the highway. If in this case there had been a dispute as to the fact of the breaking of the line or its effect on the horse's motions, the question whether the breaking of the line or the stone in the highway was the proximate cause of the injury would necessarily have been a question for the jury. So, where a traveler with a heavily loaded wagon entered on a long stretch of highway which he knew was too narrow to allow of meeting and passing another team with safety, and did not look to see whether another team was approaching or not, and, in consequence of his failure to look, met a team in the narrow cut, and suffered an injury in attempting to pass, it was held that his own negligence in entering on the defective highway without looking ahead was the proximate cause of the injury, and not the defective condition of the highway. *Seaver v. Union,* 113 Wis. 322, 89 N. W. 163. Again, in a case where a traveler has been thrown from his wagon upon a defective highway, and it is claimed by the defense that the horse was running away or beyond control, it may conclusively appear that there was a defect at the point where the injury occurred, by reason of which the traveler was

thrown out; yet, if it be shown that the horse was running away at the time, this defect is not considered the proximate cause of the injury, but rather the defect, if any, which frightened the horse and caused the runaway. *Seaver v. Union, supra; Donohue v. Warren,* 95 Wis. 367, 70 N. W. 305.

From the long line of decisions cited, as well as many others which might be cited, the conclusion is irresistible that the question of proximate cause necessarily is present in all cases of highway injuries, just as it is present in personal injury cases based upon negligence under common-law principles.

The question as to the proper definition of proximate cause cannot be considered as open to doubt. It has been many times defined, especially in recent years, and we have no disposition to go over the ground again. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735. Under this definition there can be no doubt of the absolute inconsistency of the findings of the jury. The answer to the third question says that the road was safe; the answer to the fourth question says that the plaintiff was injured thereon as a natural and probable result of its condition, and that the officers of the town should have anticipated such an injury. This last answer, if it means anything, means that the road was unsafe. They cannot stand together, unless proximate cause has a different meaning in a highway case from its meaning in other negligence cases, and this is in effect the contention of respondent's counsel. Their claim is that in cases of highway injuries it is not essential that the injuries should be the natural or probable result, or that they should have been anticipated, in order to constitute an insufficiency the proximate cause of the injuries; that the sole questions are: (1) Was the highway in fact insufficient (and this element cannot be tested by what a reasonable man would anticipate)? and (2) was the insufficiency the efficient

cause which acted first and produced the injury? Even on this basis there would seem to be an inconsistency between the answers to the third and fourth questions, but, assuming that such a distinction would harmonize the answers, we will consider whether or not the contention that there is such a distinction is correct. It can hardly be denied that there is some justification for the contention now made by the respondent arising out of the decisions made by this court in the cases of *Draper v. Ironton,* 42 Wis. 696, and *Peake v. Superior,* 106 Wis. 409, 82 N. W. 306. In both of these cases the question presented was as to the correctness of the instructions given to the jury on the abstract question of the sufficiency of the highway, and it was held that in determining that question it was error to charge that the highway was sufficient if it was in such a condition that persons of ordinary care and foresight would think that an accident would not be liable to happen thereon to a traveler exercising ordinary care; that the question was whether the highway was in fact reasonably safe, which was to be determined by the jury from the evidence as to its condition, and not by considering what a certain class of people would anticipate. In neither case was the question of proximate cause under consideration, and it seems certain that the question whether the rule stated conflicted with the well-established rules governing proximate cause was not considered. The rule so stated was doubtless based on the principle, frequently announced, that, in order to comply with the statute, the highway must in fact be reasonably safe, and that, with certain well-recognized qualifications, the duty of a town to keep its highways in proper repair is absolute, and not to be measured by the rule of reasonable diligence. *George v. Haverhill,* 110 Mass. 506; *Horton v. Ipswich,* 12 Cush. 488; *Ward v. Jefferson,* 24 Wis. 342; *Burns v. Elba,* 32 Wis. 605; *Peake v. Superior, supra.* But it is evident that this latter principle has no application to the question presented in the *Ironton*

and *Peake Cases.* Let it be granted that the duty of the town is to make the highway reasonably safe in fact; the question is, what is the standard to be applied by the jury in determining the question of safety in fact? If the jury be charged that they must determine the question of reasonable safety from all the facts in evidence concerning the condition of the road, must they not necessarily use their own judgment in the matter, and consider in their own minds whether, as reasonable men, they would have anticipated that injury would happen to a traveler? In other words, must they not, from the very nature of the case, use the same test which the court in the *Ironton Case* condemns? What other abstract test can there be of the reasonable safety of a highway except the test of reasonable liability to cause accident or injury to the traveler? We confess that we have been unable to answer these questions in any way consistent with the ruling in the *Ironton Case.* If, then, that case is to be followed, it seems to result logically that the defendant's contention is right, and that this court has in fact eliminated the element of reasonable anticipation of injury from proximate cause in highway cases; otherwise this absurdity results: that, in deciding the abstract question of reasonable safety of a highway for all travelers, reasonable anticipation of injury must not be considered; but, in deciding the concrete question of its safety for a particular traveler at a particular time, reasonable anticipation of injury must be considered.

This condition of the law upon questions which are constantly arising in the trial courts is confusing to the last degree, and it should not be allowed to continue, unless it has become so firmly established by decision that it can only be properly cured by legislation. Were any rules of property involved we should hesitate to disturb the rule of a case which has been upon the books so long as the *Ironton Case;* but, as the rule does not affect property or vested rights in any respect, we feel entirely free to straighten out the difficulty into

which our own decisions have involved us, and thus relieve trial courts of one unnecessary embarrassment in the trial of highway cases. In our judgment, the only logical way to remedy the difficult is to overrule the *Ironton* and *Peake Cases* upon the point discussed, and this we now do. The result of this conclusion is that it is proper for the court to instruct the jury, both upon the abstract question of insufficiency and the concrete question of proximate cause, that they may and should consider whether the condition of the highway was such that an injury to an ordinarily prudent traveler thereon would be the natural and probable result, and ought reasonably to have been foreseen and anticipated by reasonably prudent officers in the discharge of their duty. It is true that where both questions are put, as is frequently necessary and generally advisable, a jury may fall into the error of answering the question of sufficiency in the affirmative and the question of proximate cause in the negative, thus creating the absurdity noted in the present case; but this result can easily be avoided by the frame of the latter question, or by proper directions to the jury to the effect that the latter question is not to be answered if the highway be found sufficient.

The conclusion reached is that the verdict in the present case is fatally inconsistent, and cannot support the judgment. What has been said in the foregoing general discussion disposes of all the material questions raised in the case, except one, which requires brief attention. The trial court charged the jury that, in determining the question whether the highway was reasonably safe or not, the jury might take into consideration the age or newness of the highway in question, the character and amount of travel thereon, the condition of the surrounding lands, and all other circumstances surrounding the highway which are shown by the evidence; also "*the condition of the weather during the summer and fall of the year 1900, and the manner in which it affected the public*

*highways at the time and place mentioned.*" Exception was taken to the clause concerning the weather, and it is now claimed that it was error. It is difficult to see how the question of the weather legitimately affects the question of the reasonable safety of the highway. It might well affect the question whether the town officers had exercised reasonable diligence in discovering defects and remedying them, or, in other words, the question of notice and of reasonable diligence in making repairs; but, upon the abstract question of the reasonable safety of the highway at a given time, it logically seems to have no place. We think it should have been omitted upon this question.

*By the Court.*—Judgment reversed, and action remanded for a new trial.

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LONSTORF, Appellant, vs. LONSTORF, Respondent.

*April 21—May 29, 1903.*

***Husband and wife:*** **Consortium:** ***Alienation of husband's affections: Cause of action: Right of action in wife:*** **Stare decisis.**

1. **Ordinarily certainty of the law is more essential to justice than absolute correctness, and a rule of law adopted and long adhered to should be followed, unless *obiter dictum*, or unless conflicting decisions thereon have been made by inadvertence or otherwise, and the position of the court is already uncertain.**
2. **By the common law the wife had no property right in the performance of the marital duties of her husband.**
3. **Sec. 2345, Stats. 1898, enabling a married woman to bring an action in her own name for any "injury to her person or character," cannot be construed either to confer a new right for injuries resulting from enticing away the husband, to the interruption or loss of his *consortium*, or to confer a right to sue for any such injuries.**

**CASSODAY, C. J., and SIEBECKER, J., dissent.**

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to plaintiff's complaint charging that the defendant, her mother-in-law, maliciously, by persuasion and threats, induced plaintiff's husband to abandon and refuse to live with or support her, whereby his affections became alienated, and plaintiff lost his *consortium,* society, comfort, aid, and support, to her damage.

The cause was submitted on the brief of *Sylvester, Scheiber & Orth,* for the appellant, and on that of *Fiebing & Killilea,* for the respondent.

DODGE, J. This is a direct application to this court to reconsider the questions decided in *Duffies v. Duffies,* 76 Wis. 374, 45 N. W. 522, in 1890, and to overrule the conclusions there reached, for the present action is in no wise distinguishable from that. The trial court properly considered itself bound by the law of that case, but it is argued this court has both the power and duty, in a proper case, to correct mistakes into which it has at any time fallen. That it has such power results from its ability to execute such judgment as it may render. The irresponsibility of its power to be arbitrary is, however, the strongest argument against the propriety of any such conduct. Nevertheless, it must be conceded that cases may arise when a court ought to recognize that it has fallen into error, and should declare that its former enunciation of a rule of law is retracted. Such cases are, however, extremely rare, unless the situation be involved by other circumstances; as where the earlier pronouncement was mere *obiter dictum,* or when conflicting decisions have already been made by inadvertence or otherwise, and the position of the court is already uncertain. But for some such circumstance courts should ordinarily bow to the considerations that certainty of the law is more essential to justice than absolute correctness; that a rule of law adopted and long adhered to may

have reasons to warrant it which were apprehended by the judges who declared it, and are approved by the people who, having authority to change, have abided by it, although no such reasons are discovered by those later considering it. 1 Blackstone, Comm. 70 *et seq.; Pratt v. Brown,* 3 Wis. 603, 609; *Phillips v. Albany,* 28 Wis. 340, 357; *Hawks v. Pritzlaff,* 51 Wis. 160, 7 N. W. 303; *Case v. Hoffman,* 100 Wis. 314, 339, 75 N. W. 945; *State v. National Acc. Soc.* 103 Wis. 208, 216, 79 N. W. 220; *Harrington v. Pier,* 105 Wis. 485, 493, 82 N. W. 345; *Becker v. Chester,* 115 Wis. 90, 130, 91 N. W. 87.

Examining the case of *Duffies v. Duffies* in the light of the record and briefs filed therein, we find two important questions there considered—one of general law, one of construction of a statute. The first was whether a wife had, by the common law, any property right in the performance of the marital duties of her husband—in his *consortium,* consisting of support, counsel, assistance, and society—such as he undoubtedly had in the reciprocal duty of the wife to her husband. That question was a disputed one, and not without authority upon both sides, notably the differing opinions of Lords CAMPBELL and WENSLEYDALE in *Lynch v. Knight,* 9 H. L. Cas. 577; 3 Blackstone, Comm. 143; *Doe v. Roe,* 82 Me. 503, 20 Atl. 83; *Logan v. Logan,* 77 Ind. 559; *Foot v. Card,* 58 Conn. 1, 18 Atl. 1027; *Bennett v. Bennett,* 116 N. Y. 584, 23 N. E. 17. Among the arguments *pro* and *con* were those of general policy—whether such actions would be most promotive of justice or mere harassment and vexation. See *Doe v. Roe, supra.* That the whole question was most vigorously debated is apparent from the briefs presented. That it was most earnestly and carefully considered in all its phases by the court is rendered certain by the fact of difference of opinion among its members and the very persuasive dissenting opinion filed by the present Chief Jus-

tice. To such a situation are applicable the words of SMITH, J., in *Pratt v. Brown,* 3 Wis. 603:

"When a principle of law, doubtful in its character, or uncertain in the subject-matter of its application, has been settled by a series of judicial decisions, and acquiesced in for a considerable time, . . . courts will hesitate long before they will attempt to overturn the result so long established. So when it is apparently indifferent which of two or more rules is adopted, which[ever] one is adopted by judicial sanction it will be adhered to, though it may not, at the moment, appear to be the preferable rule."

The other question for decision was whether our statute, still unchanged in sec. 2345, Stats. 1898, either conferred upon a wife a right not existing at common law, or enabled her to sue alone to vindicate such right, if any existed. That statute enabled a married woman to bring action in her own name for any "injury to her person or character." Such words in other statutes had already received construction in *Gibbs v. Larrabee,* 23 Wis. 495; *Wagner v. Lathers,* 26 Wis. 436, and *Wightman v. Devere,* 33 Wis. 570, 575, excluding from their application injuries to relative rights of persons. Many cases from other states were cited construing statutes of more or less similarity, and were considered carefully, notably *Mulford v. Clewell,* 21 Ohio St. 191, in contrast with *Westlake v. Westlake,* 34 Ohio St. 621, and *Van Arnam v. Ayers,* 67 Barb. 544, with *Bennett v. Bennett,* 116 N. Y. 584, 23 N. E. 17. The result reached was that our statute could not be construed either to confer a new right for injuries resulting from enticing away the husband, to the interruption or loss of his *consortium,* or to confer a right to sue for any such injuries. The efficacy and permanence of a construction of one of our own statutes, deliberately declared by this court and acquiesced in for years less than those which have elapsed since 1890, is emphatically declared in *State v. National Acc. Soc.* 103 Wis. 208, 79 N. W. 220.

In the opinion in *Duffies v. Duffies,* the attention of the

legislature was expressly challenged to the question whether the rule there laid down was in accord with the public policy of this state, of which that body is the constitutional declarant; but no modification of the rule has been made, although in several other states, where a similar rule had been adopted by the courts, the legislature did act to change it, notably in Ohio, Indiana, and New York. Meanwhile, the rule of that case has entered into the body of our jurisprudence, has served to guide this court to its conclusions in *Murray v. Buell,* 76 Wis. 657, 662, 45 N. W. 667, and *Selleck v. Janesville,* 104 Wis. 570, 577, 80 N. W. 944, where it is cited, and doubtless indirectly in other cases. Further, the bar and the trial courts have relied upon it, as is evinced by the absence during thirteen years of any submission of the same questions to this court.

In the light of all these considerations, we feel constrained by the rule *stare decisis* to adhere to the law as declared in that case, regardless of whether we should now resolve the questions there decided in the same way, were they presented before us as *res integra.*

*By the Court.*—Order appealed from is affirmed.

SIEBECKER, J. I am unable to concur in the opinion of the court sustaining the demurrer to the complaint. It is stated in the opinion of the court that this case is presented to consider the question determined in *Duffies v. Duffies,* 76 Wis. 374, 45 N. W. 522. In that case the majority of the court ruled that no cause of action existed in favor of the wife at common law for alienating her husband's affections and enticing him away, causing her the loss of his love, affection, companionship, society, and aid. The gist of the decision is in the following statement:

"But we must not forget that to entice away her husband was not a wrong to the wife, and she had no right to his society, and the damages, if any, belonged to him at common law."

The import of this is that to entice away a wife's husband and deprive her of his *consortium* constitutes no injury in the law. As stated in the dissenting opinion of Chief Justice CASSODAY in that case:

"There seems to be high authority for saying that at common law an action of damages could be maintained for the alienation and loss of the affections and society of the husband from his wife."

The English cases seem to give no decisive precedent. In the case of *Lynch v. Knight,* 9 H. L. Cas. 577, the question arose, and though often referred to as an authority declaratory of the common law, both in support of as well as against the existence of such a cause of action in favor of the wife, it is not received as decisive on the question, there being a marked difference in the opinion of the judges. No other English case upon the subject has come to my notice. This is, however, satisfactorily explained upon the grounds stated by VANN, J., in *Bennett v. Bennett,* 116 N. Y. 584, 23 N. E. 17:

"The absence of strictly common-law precedents is not surprising, because the wife could not bring an action alone owing to the disability caused by coverture, and the husband would not be apt to sue, as by that act he would confess that he had done wrong in leaving his wife."

In the United States this court and the court of Maine seem to stand alone in the extreme position that enticing away a wife's husband and depriving her of his *consortium* is "no wrong to his wife, and she had no right to his society," and therefore such a loss gives her no cause of action in the law against the guilty party. Elementary writers of repute assert that this cause of action existed in the law. Bigelow, Torts, p. 153:

"To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not the

loss of assistance but the loss of *consortium* of the wife or husband, under which term are usually included the person's affections, society, or aid."

Cooley, in his work on Torts (note 2, p. 227), says:

"We see no reason why such an action cannot be supported where by statute the wife is allowed to sue for personal wrongs suffered by her."

The reasons and principles announced as the grounds of the decision in *Duffies v. Duffies* do not appear to be regarded as well founded in the law by the courts which have considered and decided the question. In *Foot v. Card,* 58 Conn. 1, 18 Atl. 1027, it is stated:

"Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in law in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society—the husband to the wife all that the wife owes to him. Upon principle, this right in the wife is equally valuable to her as property as is that of the husband to him. Her right being the same in kind, degree, and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him."

Though this right has at times been denied upon the grounds stated in 3 Blackstone, Comm. 143:

"The inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; therefore the inferior can suffer no loss or injury."

The court in *Foot v. Card, supra,* observes with persuasive force:

"We are unable to find any support for the denial in this reason, and the right, the injury, and the consequent damage being admitted, then comes in operation another rule, namely, that the law will permit no one to obtain redress for wrong except by its instrumentalities, and it will furnish a mode for obtaining adequate redress for every wrong. This rule, lying at the foundation of all law, is more potent than, and takes precedence of, the reasons that the wife is in this regard out of the pale of the law because of her inferiority."

The principle seems recognized that a wife, if injured in a trespass or other actionable wrong, had a cause of action which would survive to her, upon the husband's death, at the common law. If an injury resulted therefrom to both husband and wife, they were both required to be parties to the suit during his life, but if he died the right survived, and she could sue alone. Such personal rights were suspended on account of the want of a right to enforce them during coverture, but they were not annihilated. Reeves, Dom. Rel. 87; Bishop, Mar. Wom. § 171; *Johnson v. Dicken,* 25 Mo. 580. If, then, the wife had such rights in the law, but her legal existence, being merged into that of her husband during coverture, thereby prevented from suing in her own name, does not reason and logic declare that, the statutes enabling her to sue in her own name for any injury to her person or character, the same as if she were sole, such disability is removed? The purpose and effect of this legislation, as understood and construed by the courts, seem clearly to give the wife a standing in law distinct from her husband, and endowed with the legal power to enforce her rights as though she were sole. As a result, she is vested with the rights and obligated to all the duties as to her separate estate, her person, and her character, that the law bestows upon other persons under like circumstances.

The terms of our statutes, allowing her to recover "for any injury to her person or character the same as if she were sole," when considered in their full purpose and effect, it seems were designed to secure to her the legal remedies available for the prosecution of any action to recompense her for injuries sustained to her person, character, or separate estate. Many of the courts of the United States have declared that the injury complained of in this case comes within the class covered by these enabling statutes. This conclusion seems to have the support of the greater weight of authority, and, in my opinion, is founded upon sound reason. Among the many

cases on this subject are the following: *Warren v. Warren,* 89 Mich. 123, 50 N. W. 842; *Price v. Price,* 91 Iowa, 693, 60 N. W. 202; *Lockwood v. Lockwood,* 67 Minn. 476, 70 N. W. 784; *Foot v. Card,* 58 Conn. 1, 18 Atl. 1027; *Gernerd v. Gernerd,* 185 Pa. St. 233, 39 Atl. 884; *Wolf v. Frank,* 92 Md. 138, 48 Atl. 132; *Holmes v. Holmes,* 133 Ind. 386, 32 N. E. 932; *Bennett v. Bennett,* 116 N. Y. 584, 23 N. E. 17; *Clow v. Chapman,* 125 Mo. 101, 28 S. W. 328; *Betser v. Betser,* 186 Ill. 537, 58 N. E. 249; *Humphrey v. Pope,* 122 Cal. 253, 54 Pac. 847; *Waldron v. Waldron,* 45 Fed. 315.

Upon these grounds it appeared to me this case presented an occasion for this court to re-examine the question involved. It is stated in the opinion of the court:

"Nevertheless it must be conceded that cases may arise where a court ought to recognize that it has fallen into error, and should declare that its former enunciation of a rule of law is retracted. Such cases are, however, extremely rare, unless the situation be involved by other circumstances, and where the earlier pronouncement was mere *obiter dictum,* or when conflicting decisions have already been made by inadvertence or otherwise, and the position of the court is already uncertain."

The doctrine of *stare decisis,* I think, does not hold the court to such a strict limitation to review its decisions as here indicated. Blackstone's statement of the doctrine is:

"The doctrine of the law is this: that precedents and rules must be followed unless flatly absurd or unjust; for, though their reasons be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration."

Though this statement of the law has been subjected to criticism by commentators and judges, it is in substantial accord with the declaration of Chancellor KENT on the subject, who states:

"A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable

to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case."

It will be perceived that the doctrine as stated by these eminent jurists includes the limitation that the precedent must be a correct and just application of the law. I am not unmindful of the view often announced in decisions, that it is far more important that rules of property and contract should be certain and stable than that they should be settled in any particular way. But other considerations may press themselves upon the court, as stated by Mr. Justice SMITH in *Pratt v. Brown,* 3 Wis. 603:

"But when a question arises involving important public and private rights, extending to all coming time, has been passed upon on a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny."

In *Whereatt v. Worth,* 108 Wis. 295, 84 N. W. 411, this court substantially reaffirms these grounds, and states:

"When, however, the rule of *stare decisis* is invoked to secure adherence to a wrong doctrine, which may be corrected without prejudice to any one other than a party before the court and others similarly situated as regards pending litigation, where no rule of property is required to be changed, courts are not so firmly bound by a previous ruling but that they may correct it with considerable freedom when firmly convinced that it stands in need of correction."

It cannot be asserted that the decision in *Duffies v. Duffies* is the basis of a rule of property or contract. In its effect it has stood to withhold from a class of persons a right to compensation for an injury without forming the basis of any important right of others. Before the submission of the instant case, it stood as the single occasion where this court passed upon the point. In its application of the law, in my opinion,

the decision is incorrect, and if followed as a precedent it deprives a wife of a valuable and just legal right. I think the demurrer should have been overruled.

CASSODAY, C. J. I fully concur in the foregoing opinion of Mr. Justice SIEBECKER.

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HAMILTON, by guardian *ad litem,* and another, Respondents, vs. BUCKMAN, imp., Appellant.

*May 8—May 29, 1903.*

*Wills: Construction: Pecuniary legacy, when charge on residuum: Misconduct of executor: Estoppel: Judgment creditor of executor.*

1. In an action for construction of a will it appeared, among other things, that by the residuary clause of his will testator gave to his two sons all the residue of his real and personal property, "with the exceptions of the above named bequests," which bequests exceeded by some $2,000 the total personal estate. He had, by a prior clause in the will, given his widow, who was seven years his junior, and, at the date of the will, in vigorous health, and might have been expected to survive him many years, the right to exhaust the personal estate in her support, which might have been done before the time for the payment of the money legacies arrived. The sons, to whom the residuum was left, were appointed executors and absolved from giving bonds. *Held,* that a finding that the testator intended to charge the pecuniary legacies upon the mixed residuary fund of both personalty and realty was sustained by the evidence, and that the rights of the specific legatees were prior to the residuary legatees, or any person holding under them.
2. Where an executor, to whom was devised the residuum of testator's estate both real and personal, charged with the payment of pecuniary legacies, has converted all the personal assets to his own use, so they are not available for the payment of such legacies, he is estopped to assert the existence of such personal assets in exoneration of the realty which he takes subject to such pecuniary legacies.

**3. In such case, a judgment creditor of such executor is in no better position than the executor. His judgment is a lien merely on whatever interest the executor has in the realty, and is subject to all equities therein in favor of others.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

In 1888 George F. Austin, of Milwaukee, then about eighty years of age, executed his will, whereby he first gave all his property, real and personal, to his wife for life, with the income and profits thereof, and also the proceeds of such personal property as she might desire to sell, exchange, or convert into money for her support during her life; giving her full power of disposition of personal property for such purpose. After the death of the wife a $5,000 money legacy was given to the plaintiff *Lillian Austin,* and a $1,000 legacy to Susan A. Nichols, whose grandchildren are the other plaintiffs, and whose son is made a defendant; she having died after the testator, but before the widow. Other legacies were given amounting to $1,600. By a later clause the will provided:

"All my real estate and personal effects after the death of my said wife, with the exception of the above-named bequests, shall belong to my two sons, Edward A. and James R. Austin, share and share alike. James R. having already received on his portion ten thousand dollars in cash, and Edward five thousand six hundred, there will be due to Edward A., four thousand four hundred dollars to make them equal."

The will named the widow as executrix, and, in case of her refusal to act, the said two sons executors, with request that they be exempt from giving bonds and from making any inventory of the estate. George F. Austin died in May, 1897, survived by his wife, who declined executorship, and Edward A. and James R. were therefore appointed. Edward died a year later; and in April, 1900, James, as sole surviving executor, filed an inventory showing real estate of

value about $7,500, and personal property, consisting of household effects, $500, money in bank, $695.50, and a note and mortgage upon property in Buffalo, New York, for $10,000. The widow lived until April 19, 1901. In January, 1901, she, together with the executor, executed an assignment of the $10,000 mortgage, acknowledging as consideration $10,000, which was supplemented a few days later by a separate formal assignment to the same person by the executor alone, who at all times resided in Philadelphia, Pennsylvania. The court finds that ever since January, 1901, said executor has had in his possession the said mortgage, or the proceeds thereof, and refuses to account for any portion of the same. The money in bank was used up by the widow, as also the household furniture. There is no money or personal property within this state to pay administration expenses or the money legacies. The executor, James R., is irresponsible. This action was brought in the interest of the two money legatees above mentioned to construe the will, and declare said money legacies a charge upon the real estate in Wisconsin prior and superior to the interests of the representatives of Edward A. Austin and of James R. Austin, or any one holding under him, amongst whom is the appellant, *Charles Buckman,* who has a judgment against James R. Austin, docketed in Milwaukee county, to an amount exceeding $3,000. The court found as a fact that the intent of the testator in the will was to charge said legacies upon the mixed residuary fund of both personalty and realty, and that the rights of the legatees were prior to those of Edward and James R. Austin, or any person holding under them, including the appellant, *Buckman;* appointed a receiver, by reason of the neglected condition of the real estate, and ordered him to sell the same and turn the proceeds over to an administrator *de bonis non* with the will annexed of the estate of George F. Austin, deceased. From this judgment the defendant Buckman alone appeals.

For the appellant there were briefs by *Bloodgood, Kemper & Blodgood,* attorneys, and *Francis Bloodgood,* of counsel, and a separate brief by *Roemer & Aarons,* of counsel, and oral argument by *J. H. Roemer.*

*David S. Ordway,* for the respondents.

DODGE, J. Two points or assignments of error are urged by the appellant: First, that the finding of an intent to charge the money legacies upon the real estate given to the two sons by the residuary clause of the will is not justified by the language of the will, either alone or in conjunction with the collateral facts and circumstances; secondly, that, if so charged, the personal assets are primarily liable, and are not shown to have been exhausted.

Under the first head, we shall not deem it necessary to decide the full scope of the rule of law quite vigorously debated in the contesting briefs, as to whether, in all cases of the bestowal of a mere residuum of mixed real and personal property, there must arise an inference of intent to charge specific money legacies upon the whole of that residuum, including the real estate, to which the following among other authorities are applicable: *Greville v. Browne,* 7 H. L. Cas. 689; *Lewis v. Darling,* 16 How. (U. S.) 1; *Lupton v. Lupton,* 2 Johns. Ch. 614; *McCorn v. McCorn,* 100 N. Y. 511, 3 N. E. 480; *Will of Root,* 81 Wis. 263, 267, 51 N. W. 435. In this case the court has found such an intent by inference from facts practically undisputed. The first of these, of course, is the language of the residuary clause itself, which only gives to the two sons the real and personal property, "with the exception of the above-named bequests;" clearly indicating the purpose of the testator that such bequests should be paid, in any event, before the two sons received anything. To this may be added the further facts that the total personal estate, other than household goods, was only about $10,700; that the money bequests, including the money

to be paid to the son Edward A. to equalize between him and James R., exceeded that amount by about $2,000; that the widow, who at the time of the making of the will was some seven years younger than her husband, was vigorous in health, and might have been expected to survive him a number of years, and, under her right to dispose of any and all personal property and use up the proceeds for her support, might well have exhausted the whole of this personalty before the time for the payment of the money legacies arrived. A further fact of significance is that the residuum is left to the two sons, who are also named as executors, with the request that they be absolved from giving bonds, and who, therefore, the testator desired should become vested with authority to deal with the personal property in discretion, with the resulting power, at least, to dissipate the same, so that whatever did remain after the death of the widow might be placed beyond the reach of the money legatees. From these and certain other facts not necessary to specify, we are convinced that the above-mentioned finding of the trial court is sustained by the evidence. The efficacy of such and similar facts to support inference of such intent is discussed in the following cases: *McCorn v. McCorn, supra; Estate of Goodrich,* 38 Wis. 492; *Will of Root, supra.*

Counsel for appellant, however, invoke another rule, which, as a generality, is well recognized—that personalty is the primary source from which debts and legacies are payable, and therefore real estate, even though it be, in law, chargeable therewith, can be resorted to only in case of deficiency of personal assets. To this they add the rule that the deficiency must be of assets left by the testator, not merely a deficiency resulting from misapplication or *devastavit* by the executors. These rules are supported by much reason when invoked as between legatees and mere devisees, one or the other of whom must innocently suffer because of fault of the executor, over whose conduct the legatee has had

quite as much control as the devisee. It cannot, however, be patiently heard in a court of equity, when the devisee is also the executor, who, having received both the personal and real property, has by his own wrongful act caused the deficiency in the former. In such case most obvious principles of equity and justice exclude him from any benefit or protection as against the innocent legatee. *Wyckoff v. Wyckoff,* 48 N. J. Eq. 113, 21 Atl. 287. In the instant case, if there were any personal assets in the estate after the death of the widow, they were taken by James R. Austin, withdrawn from this state, and applied to his own uses, and by reason of such conduct are wholly unavailable for the payment of the plaintiff legatees. He certainly must be estopped to assert the existence of such assets in exoneration of the realty which he takes subject to these legacies. Of course, his judgment creditor, who is the sole appellant, stands in no better position than the executor himself. Such judgment is a lien merely on whatever interest James has in the realty, and is subject to all equities therein in favor of others.

From the views already expressed, the conclusion is obvious that certainly as against this appellant the plaintiffs are entitled to have the real estate described in the judgment applied to the legacies which are a charge upon it, and to have it sold, and its proceeds brought into court for distribution. The details of administration in accomplishing this result are not complained of. They are at least adapted to the result, and warranted by the law as applied to the situation. We find nothing of error in the judgment in any wise prejudicial to the appellant.

*By the Court.*—Judgment affirmed.

LINDENMANN, Respondent, vs. LINDENMANN, Appellant.

*May 8—May 29, 1903.*

*Divorce: Final distribution and division of husband's estate: Amount.*

**Defendant was awarded an absolute divorce from plaintiff; each party being found guilty of cruel and inhuman treatment. On final separation, before the commencement of the action, plaintiff secured household goods valued at $400, which was about one half of the husband's personal property. The net value of defendant's real estate, deducting mortgage and other indebtedness, was $2,004. *Held*, that under sec. 2364, Stats. 1898 (providing that a final division and distribution of husband's estate shall be made with "due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case"), plaintiff should not be awarded judgment for more than $650.**

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Modified and affirmed.*

Defendant appealed from that part of a judgment of the superior court of Milwaukee county in a divorce action which awards to plaintiff the sum of $2,000 as and for a final division and distribution of the defendant's estate. Plaintiff alleged failure to support, and that the defendant had been guilty of cruel and inhuman treatment, and prayed for a judgment of divorce from bed and board, and for an allowance of alimony out of defendant's property, or for a division and distribution of the defendant's estate, as the court might deem just. The defendant answered, admitting the marriage and residence of the parties, but denied that he was guilty of the acts complained of, and counterclaimed, charging cruel and inhuman treatment, and demanded judgment of absolute divorce. The parties were married November 28, 1893. No children are living as the issue of said marriage.

The parties are found guilty of cruel and inhuman treatment toward each other, and defendant was awarded a judgment of divorce from the bonds of matrimony. When the parties separated, the plaintiff secured household goods and effects valued at about $400, which amount represented about one half of defendant's personal property. All of defendant's real estate is incumbered by mortgages, his equities therein being valued at $4,150. Aside from his mortgage indebtedness he owed $2,146, leaving the net value of his property $2,004.

For the appellant there was a brief by *Doerfler, McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler.*

For the respondent there was a brief by *Fiebing & Killilea,* attorneys, and *Adolph Huebschmann,* of counsel, and oral argument by *O. J. Fiebing.*

SIEBECKER, J. The plaintiff in this case was awarded the sum of $2,000 out of defendant's estate, as a reasonable sum for a final division and distribution thereof. Had the amount of defendant's property above his indebtedness been in the form of money, we find it difficult to perceive how an award of $2,000 to plaintiff could be deemed just and reasonable, under the statute prescribing that such final division and distribution of defendant's estate shall be made with "due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case" [sec. 2364, Stats. 1898]. The fact that the defendant's property consists of equities in real estate, heavily incumbered with mortgages, renders it of uncertain value in the market, and difficult to convert into cash. Plaintiff's cruel and inhuman treatment of the defendant, as well as her failure to keep and perform her obligations as a wife, are important facts bearing upon the amount to be awarded her out of the husband's estate. We think that, under all the facts

and circumstances, the plaintiff should not recover more than $650 as and for a final division and distribution of the husband's estate. Among the decisions of this court controlling in this case are *McChesney v. McChesney,* 91 Wis. 268, 64 N. W. 856; *Roelke v. Roelke,* 103 Wis. 204, 78 N. W. 923; and *Von Trott v. Von Trott, ante,* p. 29, 94 N. W. 798. No other question is presented on this appeal.

*By the Court.*—That part of the judgment appealed from, providing for a final division and distribution of defendant's estate, is modified so as to award plaintiff $650 as a final division and distribution of the defendant's estate, and as so modified the judgment is affirmed. No costs allowed to either party. The defendant will be required to pay the fees of the clerk of this court.

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## In re Moran's Will.

*May 9—May 29, 1903.*

*"Vested" and "contingent" estates: "Vested" and "contingent" remainders: Statutes: Wills: Construction: Testamentary intent: Perpetuities: Presumptions: Time for division.*

1. The terms "vested estates" and "contingent estates" used in sec. 2037, Stats. 1898, have far different significations than the common-law terms "vested remainders" and "contingent remainders."
2. A vested remainder at the common law is one where there is "some person *in esse,* known and ascertained, who by the will or deed creating the estate is to take and enjoy the same upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat."
3. A vested estate or remainder in the statutory sense is one where there is a person *in esse,* "who, should the particular estate now cease, would, *eo instanti et ipso facto,* have an immediate right to the possession," though whether he would ever take in fact might depend upon an uncertain event rendering the interest a contingent remainder, strictly so called, by the common-law rule.

4. While a vested remainder by the rules of the common law is not subject to be divested at all, not so a vested estate in the statutory sense. That may be divested upon condition subsequent in whatever way or manner the creator thereof in creating the same may provide or authorize. Sec. 2057, Stats. 1898.
5. While at common law an estate in remainder cannot be at the same time both vested and contingent, there is that seeming contradiction as to remainders under sec. 2037, Stats. 1898.
6. A person may be so conditioned that he would immediately take in remainder should the precedent estate presently cease, yet may not be so entitled at any future time. The element of certainty, by force of the statute, gives to the remainder the character of a vested estate for the purpose of the subject covered by the statutes. The element of uncertainty gives to the remainder, by same means, the character of a contingent estate for the same purpose. Neither situation, however, has anything whatever to do with the testamentary right except as hereinafter stated.
7. Whether an estate in remainder created by will is or is not vested in the common-law sense is controlled by the character of the estate actually created, as evidenced by the testamentary intention, not by any law, common or statute.
8. The testamentary intention in any case is to be determined from the will. Rules of construction aid in discovering that in proper cases, but do not control it or prevent its execution, except in the one case of a violation of the prohibition against unduly limiting the absolute power of alienation.
9. There is a rule for the construction of wills that the law favors the vesting of estates in a common-law sense and in a statutory sense as well, as regards the subject of perpetuities, but it is not for use except in solving uncertainties, and the same is true of all other rules for judicial construction as regards wills, the same as regards all other writings.
10. When there is a devise to one, remainder over direct to others, nothing appearing in the will to the contrary, the legal presumption is that the testator intended to create vested estates in remainder in a common-law sense; that is, estates indefeasible, descendible and alienable.
11. When an estate is by will carved out of a fee and the remainder is directed to be divided between the members of a class of persons after the expiration of such particular estate, the presumption of a testamentary intention that the estates in remainder shall vest upon the death of the testator is displaced by a presumption, nothing appearing in the will to the con-

trary, that the testator purposed to create contingent remainders in a common-law sense.

12. The rule last above stated applies regardless of the doctrine of equitable conversion, that not being important except as regards the statute on the subject of perpetuities.

13. Words of survivorship in a will, in respect to a devise of property in remainder to be divided between members of a class, are presumed, nothing appearing to the contrary, to refer to the time set for such division.

14. A bequest or devise in remainder for division and distribution at some point of time distant from the death of the testator, in the absence of an indicated purpose otherwise, is to be read as a direction to divide between those persons answering the calls of the class, in being at the time set for division, and that is so regardless of the doctrine of equitable conversion.

15. The devise and bequest of property in the case in hand to the testator's wife, to be divided after her death equally among the testator's children who may survive, "also my sister Julia to have an equal share . . . with my children if she survives the death of my wife," by the intermediate period of enjoyment and indefinite point of time set for division and distribution of the property subsequent to the death of the testator, evinces an intention to postpone the vesting in a common-law sense till the arrival of such time, and to limit the participants to those then in being, of the class designated. The words of survivorship, under the circumstances, evince the same purpose. Such is also the literal sense of the words, and, there being nothing in the law to the contrary, such sense must control.

16. The purpose of the testator being determined as indicated, and not offending against the statute on the subject of perpetuities, whatever the estate in remainder be called, it does not militate against such intention being executed.

17. The estates created, tested by the statutes, are of the nature following:

(a) Estates in expectancy because commencing in the future. Sec. 2033, Stats. 1898.

(b) Future estates, because limited to commence in possession at a future day. Sec. 2034, Id.

(c) Remainders, transferable as such (sec. 2035, Id.), subject to be defeated by any condition created or authorized at the time of and in creating the same (sec. 2057, Id.).

(d) Vested estates, because at every instant of time after their establishment by the taking effect of the will, persons

were *in esse* who could be pointed to as those who would take immediately should the particular estate be presently terminated. Sec. 2037, Id.

(e) Contingent estates, because at no instant of time after the creation of the estates could any one or more of the remaindermen be said to be those who would finally come to the possession of the property.

(f) Estates subject to be defeated as to any one of the remaindermen by his decease prior to the termination of the particular estate, since the testator so provided at the time of the creation of the estates in the act of creating the same. Sec. 2057, Id.

[Syllabus by MARSHALL, J.]

CASSODAY, C. J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Roger Moran died testate. In his will were these provisions:

"To my beloved wife, the land and appurtenances situated thereon, known and described as lot No. 7, and 33 acres of lot No. 6, east of the railroad lying in the Town of Granville, in the County of Milwaukee and State of Wisconsin, now possessed by me, during the term of her natural life and after her death to be divided equally among my children who may survive.

"I also wish my sister Julia Dolan to have an equal share of the above property with my children, if she survives the death of my wife."

Proceedings were duly had in the county court for the construction thereof, the question being whether the words of survivorship referred to the death of the testator or to the death of his wife. The decision was in favor of the former. The losing parties thereupon appealed to the circuit court, where they prevailed, judgment being rendered accordingly, from which this appeal is taken.

For the appellant there was a brief by *Nath. Pereles & Sons,* attorneys, and *G. D. Goff,* of counsel, and oral argument by *Mr. Goff.* They contended, *inter alia,* that the words

of survivorship in the will refer to the death of the wife, and not to the death of the testator. 29 Am. & Eng. Ency. of Law, 486–490; 1 Underhill, Wills, §§ 349, 350; 2 id. §§ 864, 865; *Coveny v. McLaughlin,* 148 Mass. 576; *Denny v. Kettell,* 135 Mass. 138; *Knowlton v. Sanderson,* 141 Mass. 323; *Morrill v. Phillips,* 142 Mass. 240; *Fargo v. Miller,* 150 Mass. 225; *Wood v. Bullard,* 151 Mass. 324; *Proctor v. Clark,* 154 Mass. 45; *Peck v. Carlton,* 154 Mass. 231; *Pollock v. Farnham,* 156 Mass. 388; *Bigelow v. Clap,* 166 Mass. 91; *Olney v. Hull,* 21 Pick. 311; *Hulburt v. Emerson,* 16 Mass. *241; *Bates v. Gillett,* 132 Ill. 287; Schouler, Wills, 614, note 2. The will created contingent and not vested remainders in such children as were living at his death. *Scott v. West,* 63 Wis. 529; *Stark v. Conde,* 100 Wis. 633; *Patton v. Ludington,* 103 Wis. 629; 2 Williams, Executors (2d Am. ed.) 538, note; Gray, Perpetuities, § 108; 4 Kent, Comm. 226, note. If the court should prefer to construe the words of *survivorship* as referring to the death of the testator and not the life tenant, there is no reason why the court cannot supply words or phrases which the testator meant to use but unintentionally omitted. *In re Donges's Estate,* 103 Wis. 497; *Schinz v. Schinz,* 90 Wis. 236; *Hellerman's Appeal,* 115 Pa. St. 120; *Daniel's Settlement Trusts,* 1 Ch. Div. 375; *Greenwood v. Greenwood,* 5 Ch. Div. 954; *Kellogg v. Mix,* 37 Conn. 243.

For the respondent *Pynn* there was a brief by *Toohey & Gilmore,* and for the respondents, widow and major children of James Moran, deceased, there was a brief by *John F. Burke,* and oral argument by *John Toohey.* They contended, *inter alia,* that it was the presumed intention of the testator that the beneficiary should have the actual enjoyment, rather than the technical ownership, of the property, and that therefore the presumption would be that the beneficiary's estate became vested at the death of the testator. *McArthur v. Scott,* 113 U. S. 340; *Baker v. Estate of McLeod,* 79 Wis.

534–541; 1 Underhill, Wills, §§ 349, 350; *Patton v. Ludington,* 103 Wis. 629, 650; *Hersee v. Simpson,* 154 N. Y. 496–502; *Burnham v. Burnham,* 79 Wis. 557; *Stark v. Conde,* 100 Wis. 643; *Smith v. Smith,* 116 Wis. 570; *Estate of Hoffen,* 70 Wis. 524. The weight of authority sustains the contention that words of survivorship refer to the period of the testator's death, if no special intent appears upon the face of the will to the contrary. *Porter v. Porter,* 50 Mich. 456; *Moore v. Lyons,* 25 Wend. 119; *Estate of Brown,* 93 N. Y. 298; *Scott v. Guernsey,* 48 N. Y. 106; *Low v. Harmony,* 72 N. Y. 408; *Grimmer v. Friederich,* 164 Ill. 245; *Hansford v. Elliott,* 9 Leigh (Va.) 79; *Stone v. Lewis,* 84 Va. 474; *Drayton v. Drayton,* 1 Desaussure's Eq. 324; *Hoover v. Hoover,* 116 Ind. 498; 29 Am. & Eng. Ency. of Law, 489; note 1; *In re Albiston's Estate,* 117 Wis. 272.

For *Michael Moran,* minor, there was a separate brief by *William W. Wight,* guardian *ad litem.* He contended, *inter alia,* that unless a contrary intention clearly appears, wills operate from, and estates vest at, the death of the testator. *Toms v. Williams,* 41 Mich. 552; *Rood v. Hovey,* 50 Mich. 395; *Union Mut. Asso. v. Montgomery,* 70 Mich. 587. When a devise is made to take effect "after" the death of a preceding devisee, the intention is not to create a contingent estate, but to indicate when the remainder shall take effect in possession—the commencement of the enjoyment of the estate. *Scott v. West,* 63 Wis. 529; *Livingston v. Greene,* 52 N. Y. 118, 123; *Embury v. Sheldon,* 68 N. Y. 227, 236; *Corse v. Chapman,* 153 N. Y. 466; *Hersee v. Simpson,* 154 N. Y. 496, 500. The law favors vested rather than contingent estates. *Doe dem. Long v. Prigg,* 8 Barn. & Cres. 231, 238; *Blanchard v. Blanchard,* 1 Allen, 223, 225; *Peck v. Carlton,* 154 Mass. 231, 233; *Porter v. Porter,* 50 Mich. 456, 461; *Heilman v. Heilman,* 129 Ind. 59; *Martin v. Kirby,* 11 Gratt. 67, 77; *Burnham v. Burnham,* 79 Wis. 557, 566; *Patton v. Ludington,* 103 Wis. 629, 650; *Grimmer v.*

*Friederich,* 164 Ill. 245, 249. Vested estates are favored because they are less likely than contingent estates to occasion intestacy, and intestacy is a condition which a testator does not intend and the law does not favor. *Martin v. Kirby,* 11 Gratt. 67, 73; *In re Donges's Estate,* 103 Wis. 497; *Davis v. Davis,* 109 Wis. 129, 132.

MARSHALL, J. This case presents for consideration a question not altogether new, but one that is of special interest in view of a material difference of opinion as to what constitutes a vested estate in the circumstances of the will in question, and the effect of sec. 2037, Stats. 1898, in respect thereto. From the views expressed independently in *In re Albiston's Estate,* 117 Wis. 272, 94 N. W. 169, and more fully stated during the discussion leading up to the decision now reached, it appears that possibly there is an unsolved question here as to whether, when an estate is vested under sec. 2037, Id., on the subject of limiting the right to put restraints upon the power of alienation, words of survivorship necessarily take effect as of the time of such vesting, with all the common-law incidents of vested estates. That was the cause of the difficulty observable in the decision in *In re Albiston's Estate,* we venture to say, and of absence of the same difficulty in *Smith v. Smith* 116 Wis. 570, 93 N. W. 452, the statute being there cited as important if not controlling, which, so far as possible, was withdrawn in the opinion of the court in the later case, though without unanimous concurrence. The will in the *Smith Case* did not deal with real estate, but the use there made of the statute, upon the theory that realty was involved, is now said among us to be applicable here, the view being that, a vested right to take, as regards the statute respecting restraints upon the power of alienation, gives effect, in point of fact as well as in point of right to the common-law incidents of vested estates; that is, that the right, by force of the statute, is accompanied pres-

ently by the indefeasible title in remainder, the mere enjoyment of the property being postponed till the termination of some particular precedent period of enjoyment carved out for another or others, so that in case the person to take in remainder dies before the time arrives for his enjoyment to commence his right will go to his heirs. If that be the case, surely *In re Albiston's Estate* was decided wrong, and the judgment in this case is right. If we have overstated the scope of the doctrine which we feel bound to consider, and it goes only to making the statutory vesting presumptive evidence of intention that the actual vesting shall accord therewith, not to be overcome other than by clear and unmistakable evidence to the contrary, the necessity to discuss the question would be the same.

We entertain the view that the term "vested" is used in sec. 2037 in a much broader and far different sense than that of the common law. The latter comprehends not a mere right to a class to take in the future, which may be defeated as to any member thereof upon his death happening before the arrival of the period for taking in fact, but a condition of the title *in præsenti,* in that it is presently vested in point of fact as well as right in the remainderman in being, the enjoyment only being postponed until the happening of some specified contingency. Under the statute a class of persons having mere possibilities in respect to being clothed with the title in fee, upon the termination, in their lifetime, of a precedent life estate, so long as they possess the entire right to take in remainder, enabling them, by presently joining with the life tenant, to convey the whole title, are possessed of vested interests in the eye of the law, though they have no title presently, strictly so called, at all, and a nonsurvivor to the time for enjoyment to commence will never acquire any such title.

Sec. 2037, Id., has nothing to do, necessarily, with the question of vesting in a common-law sense, in the sense material to the question of whether there is an actual taking of

the title in remainder upon the death of the testator under the same or similar circumstances to those of this case, that will preserve such title as to each of the remaindermen or in his line. The statute cited, with its accompanying provisions, deals mainly with limitations upon the right to absolutely suspend the power of alienation. For that purpose mere possessors of possibilities as to receiving a fee title are deemed by the fiction of the law, so to speak, to have present vested estates, if conditions be such that they may, by joining with the person or persons presently enjoying the property, convey it absolutely. It must be plain that where such is the case, in respect to a devise of an estate to be divided between members of a class who may survive until the expiration of a precedent life estate, no member of the class takes title, strictly speaking, during such precedent period. The right of each is dependent upon his surviving until the period for taking and distribution arrives. It is wholly contingent by the common law, though plainly vested by our statute, sec. 2037, and contingent as well.

If we are right in the foregoing, and the influence of a contrary theory has to any degree colored the treatment of any of our decided cases so that it may reasonably be believed that it has received indorsement as the law, the advisability of guarding against the danger that might come of it cannot be overestimated. We will say in passing that if there is a case in our books where a wrong conclusion was reached under the influence of such a contrary theory, we are unable to find it after a very thorough search therefor; while, on the other hand, we find it very distinctly recognized, in the opinion of *Ford v. Ford,* 70 Wis. 19, 33 N. W. 188, written by the present Chief Justice, quoting from the masterly analysis of the New York statutes on the subject of perpetuities, of which ours as to real estate is a copy, in *Coster v. Lorillard,* 14 Wend. 265, this single sentence referring to

the terms "contingent" and "vested" as regards future estates such as are referred to in our sec. 2037, Stats. 1898:

"These definitions of vested and contingent remainders are very different from the common-law definitions of these estates."

With the characteristics of a vested estate at common law clearly in mind, one may easily observe, upon reading the statute, that there was no purpose to embody therein in its entirety the common-law idea, nor any intention to deal, either as a rule of evidence or otherwise, with the meaning of testamentary or contractual words as regards when title is or is not vested, respecting anything but limitations upon the right to absolutely suspend the power of alienation and the other features found in the statutes, among them, that rendering expectant estates, whether contingent or vested, transferable and subject to be defeated by any act or means which the party creating the same may have prescribed. Secs. 2033, 2034, 2057, Stats. 1898.

Really, this matter seems to have been so definitely settled along the lines we have indicated, since the first full definitions of the statutory system of vested and contingent estates and limitations upon the right to suspend the power of alienation were given, found in the opinion of SAVAGE, C. J., to which we have referred, though the controversy was unsuccessfully renewed in respect thereto in New York, as we shall see, that we would not feel justified in this extended treatment if we were not face to face, as indicated, with a division of opinion in respect to the matter. In that situation, if we must adhere to the view that a vested estate under the statute is not a vested estate, necessarily, at common law, and that the statutory vesting does not militate against the possession of the right being divested and the same going over to some other person or persons under the circumstances of the case before us, it is due to the court that the fact should be stated, accompanied with reasons therefor, even if in the

course thereof we drift somewhat into a discussion of elementary principles.

"Vested remainders (or remainders executed, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside." 1 Cooley's Blackstone, Bk. 2, p. 169.

There is the essential of the common-law vested remainder told so plainly that one cannot well mistake it for a definition of vested remainders under secs. 2037 and 2038, Stats. 1898. After the adoption of the new system in New York, as is usual in all radical departures from the common law, many eminent judges did not take kindly thereto and struggled to retain the common-law characteristics of vested estates, notwithstanding the plain language of the statute inconsistent therewith. As late as 1869, some over forty years after the new system was adopted and more than thirty years after the decision in *Coster v. Lorillard,* 14 Wend. 265, so eminent a jurist as Judge GROVER, in *Moore v. Littel,* 41 N. Y. 83, in a very vigorous opinion, concurred in by two of his associates, insisted that the vested future estate of the statute is in all respects the vested remainder at common law, and that a person not answering the calls of the common-law rule in that regard, yet having an estate in expectancy, has at best but a contingent interest. He argued that, otherwise, in case of a devise to A., remainder over to the children of the testator living at the death of A., such children would take both vested and contingent remainders, which would be an absurdity; that the only way to avoid confusion is to hold that in such a case, since no one can tell to whom the estate in remainder will finally go, it is contingent. Applying that to the case before us, viewing the will as a devise to the testator's wife, remainder over to the survivors of the class composed of his children and sister Julia, they all, under the

statute and from the common-law standpoint as well, took contingent remainders. On the other hand the court, speaking by WOODRUFF, J., held that the new system was not intended to be a statutory declaration of the common law, but an abrogation of it, in some respects at least, and a substitution in lieu thereof of a new system of vested estates which might be mere possibilities, or estates vested in one sense but contingent in another,—vested, but subject to be divested upon the happening of a condition subsequent, and not affected by common-law incidents of vested estates or by any other than those indicated in the statute. In the case there in hand there was a devise to A., who had children, remainder over to his heirs. The question was, did the children take interests in severalty during the lifetime of the father, which any one of them could convey, and if so would the conveyance pass an indefeasible interest or one subject to be defeated by the decease of the grantee during the lifetime of the father? In the affirmative it was contended that they took contingent interests by the rules of the common law, which were inalienable during the lifetime of the father and subject to be entirely defeated as to any one of them by his decease during continuance of the life estate; and that the statutory system was not intended to change such rule. In the negative it was contended that, if conditions exist in any case so that instantly upon the determination of the particular estate those who are to take in remainder will be known, the estate in remainder is not, strictly speaking, a contingent remainder at common law or under the statute, though it be not an indefeasible estate during the existence of the particular state. The learned judge who wrote the opinion recognized that there was some difference of opinion as to the true character of vested remainders at the common law, strictly so called. He thought, in a true sense a remainder may be vested under the common-law rules, and yet be subject to be divested upon the happening of a contingency. By that it will be seen that the definition of a contingent re-

mainder, by the elementary rule stated by the old writers, was enlarged somewhat in an effort to make the statutory and common-law rules harmonize. But during the discussion the learned judge thought best to discard "all the abstruse and refined discussions and disputes, as to what constitutes an estate, and what a mere possibility or expectation," by common-law principles, and to look to the plain language of the statute. In that he saw, rejecting technical expressions and phrases ordinarily employed, that "person" in the statute meant just what it expresses and no more; that is,

" 'When there is a person in being,' means when you can point to a human being, man, woman or child; and, 'who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate,' means that if you can point to a man, woman or child who, if the life estate should now cease, would, *eo instanti et ipso facto,* have an immediate right of possession, then the remainder is vested, and, by necessary consequence, all the contingencies which may operate to defeat the right of possession are to operate, and only to operate as conditions subsequent."

That is to say, that a true vested remainder under the statute may be but a contingent remainder at common law. It may or may not be according as the "man, woman or child" you shall point to be entitled to take in remainder, as one "whose estate nothing can defeat or set aside," or one whose right "in remainder may never take effect," referring to the definition quoted from Blackstone, which harmonizes with all the older text-writers, and all the new as well, that have not fallen into confusion by failing to appreciate that the statutory definition is not a mere statutory enactment of common law, but one that largely cuts loose from the common law and erects a new system.

It is said in 4 Kent, Comm. (14th ed.) 202, speaking of common law estates:

"An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seisin."

Speaking in close connection therewith it is said that under the New York statute there is a vested estate "when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate." And again, at page 206, speaking of the distinguishing characteristics between vested and contingent remainders, it is said: "It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment." Applying that to the case in hand, we see that the right of enjoyment as to each remainderman, at the death of the testator, was dependent upon his surviving the life tenant.

In 2 Washb. Real. Prop. (6th ed.) § 1532, the same rules are stated in this way:

"The broad distinction between vested and contingent remainders is this: In the first, there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all."

One will easily apply that to the case in hand at once, seeing the contingency as to whether any particular remainderman will ever survive the life tenant.

The controversy we have indicated as existing in New York a generation after the new system had received judicial exposition in *Coster v. Lorillard,* exhibits the tenacity with which courts cling to common-law principles even after being displaced by a plain statute, as we have before indicated. When we observe that the controversy opened in 1832 and was then fully settled, so far as a single judicial decision can settle any question, and the doctrine there announced was fully indorsed in the great case of *Hawley v. James,* 16 Wend. 61, and yet observe that it was in vigorous activity in 1869, we need not marvel very much to find ourselves, a generation later, discussing the matter afresh.

We have striven to treat the subject in hand as briefly as possible and yet do justice to the court and the question, drawing only from the very fountain heads of the common law, and of statutory exposition applied to the new system in New York before it was adopted here. There is no end to what might be said if we were to endeavor to review decided cases in detail. Such a review would be interesting and would probably re-enforce very strongly what has been said, yet the principles finally declared would probably not be left as easily understood and impressed as firmly upon our judicial system as by omitting such discussion. However, we cannot well close the matter without referring more particularly to *Coster v. Lorillard* and *Hawley v. James,* because they were, in effect, incorporated into the New York statutes before we took them.

In *Coster v. Lorillard* the ultimate question at issue was whether, upon the facts, there had been an unlawful suspension of the absolute power of alienation. Justice SAVAGE at the outset, in discussing the statutes, referred to the notes of the New York revisers as indicating what their purpose was in framing the new system, namely, that it was, among other things, to "render a system simple, uniform and intelligible, which was various, complicated and abstruse," showing that they purposed more than a mere solution, by statute, of uncertainties in regard to the common law; that they contemplated radical changes in the essential elements of estates. These expressions, showing what the revisers intended, were quoted:

"To abolish all technical rules and distinctions, having no relations to the essential nature of property or the means of its beneficial enjoyment, to define with precision the limits within which the power of alienation may be suspended by the creation of contingent estates, and to reduce all expectant estates substantially to the same class, and apply to them the same rules, whether created by deed or devise."

"If a rule of law is just and wise in itself, apply it universally, so far as the reasons upon which it is founded ex-

tend, and in no instance permit it to be evaded; if it is irrational and fanciful, or the reasons upon which it is rested have become obsolete, abolish it at once."

So it will be seen that the revisers constructed the new system regardless of anything in the old one which, in their judgment, was "irrational and fanciful," or rested upon "obsolete reasons," or was "various, complicated and abstruse." They published, in effect, that they intended to make "great and radical changes throughout," quoting the language of Chief Justice SAVAGE. Did they accomplish their purpose as to vested and contingent estates? We may best answer that, for the purposes of this case, by further quoting from Chief Justice SAVAGE's opinion:

"These definitions of estates and contingent remainders, it will be seen, are very different from the common-law definitions of those estates. At the common law vested remainders are those by which a present interest passes to the party, though to be enjoyed in the future, and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent. By this definition the remainder in the present case is not embraced, for, by the devise, a present interest does not pass to any particular determinate person to whom it is to remain invariably fixed. . . . But by the statute definition this is a vested remainder, because there are persons in being who would have an immediate right to the possession upon the ceasing of the precedent estate, that is, there are persons in being who would take the possession of the estate were the precedent estate now to cease. . . . This remainder is also contingent, according to the statute definition."

"The learned antiquarian will pause and ponder over this vast pile of ruins; venerable at least for their antiquity, the erection of which occupied centuries, and put in requisition the labors of kings, ecclesiastics and laymen. Upon these ruins have been erected new edifices—a new system of uses and trusts, apparently plain and intelligible, and adapted to the real wants of society; but whether it is so in reality is yet to be proved."

In *Hawley v. James, Coster v. Lorillard* was fully approved, and the idea that a remainder can, in a true sense, be called other than contingent when the right of future enjoyment by the terms of the will is dependent upon survivorship, was repudiated in the most vigorous terms. In the opinion by Justice COWEN a distinction was drawn between vesting in respect to the mere right to take contingently, and in respect to vesting in interest. After indorsing, expressly, all that was said by SAVAGE, C. J., in the *Coster Case,* and reviewing many authorities, he said:

"With such a train of authorities, so clearly settling and recognizing the rule, . . . that survivorship is an uncertain event, and prevents the person who is to take, from being determinate and ascertained, and especially where there is an alternative as to the persons, depending on their being *in esse* at a given period of time, I cannot allow myself to entertain a moment's doubt that the remainder in this case is contingent, and that it cannot vest in interest until the persons who are to take are ascertained by the fact of their being in life at the expiration of the trust term."

We may rest from our labor, satisfied, it seems, that we have demonstrated that our statute, sec. 2037, is not a declaration of the common law at all, though common-law terms are found therein; that the fact that an estate in remainder is vested as regards limitations upon the right to suspend the absolute power of alienation does not suggest that it is vested absolutely in remainder and that the remainder is alienable according to the rules of the common law. It may be a contingent remainder only, if such be the expressed intention of the creator of the estate. When we are called upon to determine whether, as to an estate in remainder created by will, it vested absolutely at the death of the testator, we are not to be influenced by the statutory rules upon the subject of restraints upon the absolute power of alienation, but by the will itself. The statute, in effect, so declares. Sec. 2057, Stats. 1898. However, we are to keep in mind,

of course, where the intention of the testator is not plainly expressed, the familiar rules for solving ambiguities. Having determined the testamentary intention of the testator, the question of whether the effect of the will was to create mere contingent remainders will have been answered, though what we call such, if there were circumstances requiring us to test the will as regards whether it unduly suspended the absolute power of alienation, we might find, in that light, that we were dealing with vested estates. In short, in solving the question before us in this case, the statute, sec. 2037, does not necessarily cut any figure whatever. True, the estates in remainder, for the purposes of the statute, are unquestionably vested estates; but that does not militate at all against their being contingent by the rules of the common law so that the result of the decease of any one of the prospective takers in remainder would be to defeat his right, and cause the same to devolve upon the other members of his class, nor against the estate being subject to be divested, and go as indicated by the statutes as well.

Many principles here discussed were treated to some extent in *Becker v. Chester,* 115 Wis. 90, 91 N. W. 650. They would, had they been applied, have led to the result reached in *Smith v. Smith,* 116 Wis. 570, 93 N. W. 452, *McWilliams v. Gough,* 116 Wis. 576, 93 N. W. 550, and *In re Albiston's Estate,* 117 Wis. 272, 94 N. W. 169, and perhaps some other cases, regardless of the doctrine of equitable conversion.

Applying the foregoing to the will before us, viewing the sister of Roger Moran and his children as a class, if he intended that neither should take till the death of his wife, all became possessed, at his death, of contingent remainders by the common law, since there was not then, as to either, "a fixed right of future enjoyment." Testing their interests by the statute they were estates in expectancy, because limited to commence in possession at a future date. Sec. 2033, 2034, Stats. 1898. Such estates were also properly designated as re-

mainders, because dependent upon a precedent estate, and, whether vested or contingent, were transferable absolutely or subject to be defeated upon condition subsequent. Secs. 2035 and 2057, Id. The future estates or remainders were vested in character under sec. 2037, because there were persons designated who "upon the termination of the intermediate estate would *eo instanti et ipso facto* have an immediate right to the possession and enjoyment." Such estates were also contingent under sec. 2037, since at no time prior to the termination of the precedent estate could we point to any particular one or more of them, singling out the person or persons who would at all events ultimately become possessed of the property. Such remainders, from their creation, were subject to be defeated, "in any manner or by any act or means which the testator, at the creation of the estates, and in the creation thereof, provided or authorized." Sec. 2057, Id. It follows, necessarily, that in whatever way we view the will, we have the plain, simple duty to perform of discovering the intention of the testator and giving effect thereto, since there is nothing about the testament offending against any law. In determining the testamentary intention we must look only to the will. Rules of law may aid in discovering it, but they do not control or defeat it. That doctrine was very concisely expressed and directly applied in *Smith v. Smith,* 116 Wis. 570, 93 N. W. 452.

Turning now to the performance of the primary duty above indicated, it must be conceded that, whether the testator intended his children to take immediately upon his death, and that the enjoyment only should be postponed till the termination of the life estate, dependent upon whether the word "survive" was used with reference to his death or that of his wife. No statute or common-law rule controls that, as we have seen, or affects it, except by way of solving ambiguities. Precedents cannot help to any great degree. It may be admitted that, nothing appearing clearly to the contrary in the

language of a will, the presumption generally is that a bequest or devise takes effect, "in point of right upon the death of the testator" (*Scott v. West,* 63 Wis. 529, 24 N. W. 161, 25 N. W. 18), and that the law favors the vesting of estates, and that a construction of a will that will accomplish that result will be preferred to one which does not (*Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073). Many other helpful general rules might be referred to, to which we could resort in solving ambiguities. But at the outset we must have ambiguity before we can enter upon the field of interpretation or construction. Too often that fundamental principle is not given its proper significance, and ambiguities are created by construction when there are none in fact,—the meaning of the will being either plain and unmistakable, giving the words their ordinary signification, or the probabilities pointing so strongly in one direction that the paramount duty of the court to give effect to the purpose stands in the way of seeking for a justification to go in some other way.

Much is said in cases of this kind by way of argument as to circumstances sufficient to overcome the presumption as to vesting upon the death of the testator, as if there were always such a presumption, and as if in case of such vesting having taken place there could be no divesting, which is not the fact, as we have seen. Such rules prevail in the absence of anything in the will clearly indicating to the contrary. But where there is a precedent life estate, and the devise or bequest is not direct to those who are to take in remainder, leaving the period of enjoyment to commence only after the termination of a precedent life estate, but the bequest or devise is in the form of a direction or an expressed purpose that at the termination of the precedent estate the property shall be divided between certain persons specified, that circumstance is held to effectually displace the presumption as to immediate vesting, and create the presumption, nothing appearing clearly to the contrary, that the intention of the

testator was that the estate in remainder should not vest until the time for division and distribution should arrive. *Smith v. Smith, supra; Patton v. Ludington, supra; Scott v. West, supra; In re Denton,* 137 N. Y. 428, 33 N. E. 482; *Fowler v. Ingersoll,* 127 N. Y. 472, 28 N. E. 471; *In re Baer,* 147 N. Y. 348, 41 N. E. 702; *Lyons v. Ostrander,* 167 N. Y. 135, 60 N. E. 334; *In re Brown,* 154 N. Y. 313, 48 N. E. 537; *Salisbury v. Slade,* 160 N. Y. 278, 54 N. E. 741; Underhill, Wills, § 346.

Much difficulty, it seems, often arises by being impressed so strongly with the general rule, as to the immediate vesting of estates, applicable where the devise or bequest is direct to the remainderman, as in *Patton v. Ludington,* that the rule, applicable where the devise or bequest is not direct in form, but rather in the form of a direction to divide and distribute after the termination of the precedent estate, and also the distinction between vesting at common law and under the statute, particularly that as to the former the estate may have all the characteristics of a contingent estate at common law, and that the statute so provides, are overlooked or not given their proper weight. The second rule mentioned was applicable and given full effect in the recent cases of *In re Albiston's Estate,* 117 Wis. 272, 94 N. W. 169, and *McWilliams v. Gough,* 116 Wis. 576, 93 N. W. 550. The distinction should always be made between a devise or bequest to a class subject to a precedent life estate, and a devise or bequest to one for life with a direction, express or in effect, that at the termination of the life estate the property shall be divided and distributed between the members of a class, regardless of whether the property dealt with be realty or personalty. That important distinction will be found very thoroughly discussed in some of the New York cases we have cited. By keeping it in mind, one may easily understand how the decision was arrived at in *"Matter of Brown"* and similar cases, that there was an immediate vesting upon the

death of the testator, and the decision was arrived at in *In re Denton,* and *Salisbury v. Slade,* that the vesting of the estate was postponed till the termination of the precedent life estate. At the same time one will avoid confusing *Patton v. Ludington* and similar cases with *In re Albiston's Estate* and similar cases. In the latter class of cases the words of survivorship, nothing appearing to the contrary, are presumed to refer to the happening of the event which will render necessary the ascertainment of the members of the class among whom the remainder of the estate is to be divided; while in the former class, such words, nothing appearing to the contrary, are presumed to refer to the death of the testator. So, in connection with the rules that the law favors the immediate vesting of the estate upon the death of the testator, and that it will be presumed that such was the intention of the testator, nothing appearing to the contrary, it should be understood that the necessity for the ascertainment of the members of a class among whom the estate is directed to or will be divided after the termination of the precedent estate, satisfies the proviso of the rule in respect to immediate vesting and destroys its force. A devise or bequest to a class is deemed to be one thing, and a devise to the survivors out of a class, or a direction, as in this case, that "after," etc., the property "to be divided equally among," etc., used in connection with express words of survivorship, closely connected with the event to which the word naturally refers, is plainly another thing. The term "vested" is here used with reference to its strict common-law signification, that is, the condition, as we have seen, where the right has become fixed where it is to remain absolutely, though the enjoyment thereof may be postponed to the termination of a particular precedent estate.

In *Lyons v. Ostrander,* 167 N. Y. 135, 60 N. E. 334, the will was treated as if it dealt with real estate, though it is true the doctrine of equitable conversion might well have

been applied. It does not seem, however, that the character of the law in that regard was considered material. It was said that the rule that words of survivorship in a will refer to the time of the testator's death does not apply to a case where a point of time is mentioned in the will other than the death of the testator, to which the contingency which shall call for a distribution and division of the estate can be referred, or where a life estate intervenes, or where the context of the will evinces an intent that the vesting of the estate in the remainderman shall be postponed. Here "vesting" was used in its common-law sense. So it was held that, although under the circumstances of that case a remainderman took a vested interest upon the death of the testator, speaking, evidently, of vesting in the statutory sense, it became divested by the predecease of the life beneficiary, and went over to the children of such deceased remainderman, not by force of the law, but because the will so directed.

Probably the rule that a devise or bequest to be divided between the members of a class at some point of time distant from that of the death of the testator, nothing appearing to the contrary, means among such persons as shall then be *"in esse"* is as well illustrated by *Matter of Baer,* 147 N. Y. 348, 41 N. E. 702, as could be by reference to a multitude of cases. It is sufficient to refer to the syllabus covering the subject, which is a concise deduction from the opinion of the court:

"Where final division and distribution is to be made among a class, the benefits of a will must be confined to those persons who come within the appropriate category at the date when the distribution or division is directed to be made."

In such a case the will, nothing appearing to indicate a contrary intent, is to be read, not as a devise directly to the members of the class, as explained in *Patton v. Ludington,* but as a devise to the survivors of the class, the term "survivors" pointing to the time set for the division to take place.

That is because the circumstances evidence such as the testamentary intention, which must always govern, as we have seen. We do not shape that with reference to any statute, but we find what that is, and then we give the appropriate name to the estates created. If we call them vested estates, where they fall within the rule stated, we mean vested in a statutory sense, and subject to be divested upon condition subsequent. We have a good illustration of that in vol. 4, Gould's edition of Kent, p. 203, which also illustrates the confusion that one is liable to fall into by not distinguishing common law from statutory vesting. The editor quotes Williams on Real Property to the effect that an estate always ready for distribution upon the termination of the precedent estate, answers to the calls of a vested remainder, saying, in effect, that while that accords with the New York statute, it is defective as a common-law definition, and gives this illustration, citing many authorities:

"If land is devised to the testator's wife for life and at her death to such of the testator's children as shall then be living," upon the will taking effect, there being a wife and children, "the persons who would take at any given instant, if the wife's estate should determine, then, are ascertained, and the remainder is always ready to come into possession at any moment. *Yet this is unquestionably a contingent remainder.* On the other hand a devise to testator's wife for life, remainder to B., C., D., E., and F., 'provided that if any of the last five named children die before my wife, then the property to be equally divided between the survivors,' gives a vested remainder, defeasible on condition subsequent."

While the illustration is valuable to support our conclusions here, we think the learned author failed to note the full scope of the distinction between the common-law and the statutory definitions under which, in both cases, the remainders were contingent by the common law, and both vested and contingent by the statute; vested, because at every instant of time after the taking effect of the will there would

be persons in being who would have the immediate right to the possession upon the termination of the precedent estate; contingent, because at no instant of time prior to the termination of the precedent estate could any one or more of the remaindermen be pointed to as the person or persons who would ultimately enjoy the property. The author recognizes that whether any member of the class will ultimately take is dependent upon the same contingency, viz., survivorship till the termination of the precedent estate. He then finds a reason for calling the remainder first one thing and then another to satisfy the intention of the testator, which does not concern the substance of things at all. Why such straining to use terms by their common-law meaning regardless of the utter uselessness thereof? The author finally comes down, as will be seen from a careful examination of his notes, to the idea that the testator's intention must govern regardless of what we call the estates which he creates. That was the conclusion in *Smith v. Smith,* 116 Wis. 570, where Mr. Justice WINSLOW, speaking for this court, said, in effect, that all minor rules and statutes are to promote rather than to defeat the one dominant principle that the intent of the testator must prevail. There the direction to divide and distribute at a future uncertain time was held to indicate that only those *in esse* at the instant of time set for the distribution were entitled to take, because, regardless of what we might name their remainders, they were after all but expectant estates and it was competent for the testator to give any direction to them he might see fit, under sec. 2057, Stats. 1898, so long as sec. 2038 was not violated. The decisions in *Scott v. West, Ford v. Ford,* and *Patton v. Ludington,* are in harmony with that view.

It is believed that if the learned trial judge had viewed the will before us in the light of the foregoing stated principles, a different result would have been reached than the one complained of. The will contains the elements of pre-

cedent life estate, remainder, which the testator directed to be equally divided among his children, the direction limited by the words, "who may survive," used in direct connection with the event upon which the division was made dependent, to wit, the death of his wife, and nothing appearing upon the face of the will indicating that the words of survivorship referred to any other event than that event. Going no further, it would seem that the members of the class among whom the testator intended his estate in remainder to be divided must remain uncertain till the death of the life tenant. If there could be any reasonable doubt about that from the language of the residuary clause referred to, there is the second paragraph added, which would remove that doubt. After the use of the language wholly disposing of the entire estate, the added words, in a separate paragraph, "I also wish my sister Julia Dolan to have an equal share of the above property with my children, if she survives the death of my wife," indicate very strongly this to have been the state of the testator's mind at the time of making such addition: either, in drafting the preceding paragraph by inadvertence his sister Julia was omitted; or after the testator's scheme, as at first formulated, was fully spread upon the paper, it occurred to him that his sister Julia should be provided for, whereupon, with the idea to place her in the class with his children, he added the words above quoted. It seems unmistakable, taking both paragraphs together, that the purpose of the testator was to put his children and his sister Julia into one class for distribution of his estate in remainder equally after the death of his wife.

*By the Court.*—The judgment appealed from is reversed and the cause remanded to the circuit court with directions to enter judgment affirming the judgment of the county court and for further proceedings according to law. The taxable costs in this court upon both sides will be a charge on the contingent interests of the parties to this litigation in the

property in controversy, but not paid out of the estate to the prejudice of the life tenant.

CASSODAY, C. J. I do not wish to have the ground of my dissent in this case misunderstood. The case of *Coster v. Lorillard,* 14 Wend. 265, commented upon at length in the opinion filed, and the case of *Hawley v. James,* 16 Wend. 61, therein referred to, were both cited in the opinion of this court in *Ford v. Ford,* 70 Wis. 19, 60, 61, 33 N. W. 188. Those cases were thus cited because the question under consideration was whether the devise of the homestead, in Wisconsin, in trust, by its terms, suspended the absolute power of alienation for a longer period than prescribed by the statutes in force in this state, and which had been copied from the statutes of New York—citing secs. 2034, 2037, 2038, 2039, 2086, 2089, and 2091. Following those cases, it was held that such devise of the homestead was invalid, because during the period prescribed there was and could be "no person in being by whom an absolute fee in possession" could be conveyed. *Ford v. Ford, supra; Coster v. Lorillard,* 14 Wend. 303, 307 (per SAVAGE, C. J.); *Hawley v. James,* 16 Wend. 121, 122 (per NELSON, C. J.). What was said in those opinions about vested and contingent estates and remainders, had reference to the question of perpetuities. But no such question has been raised by counsel in this case, and no such question is here involved. The only question here for consideration is the construction to be given to the devise which gave, bequeathed, and disposed of the estate as follows: "To my beloved wife the land and appurtenances" described "during the term of her natural life, and after her death to be divided equally among my children who may survive." The language is plain, and free from ambiguity. There is no question of equitable conversion involved. The simple question here is whether, upon the death of the testator, the children took a vested estate in the lands so devised. Four

years after the decision in *Hawley v. James, supra,* the same court held:

"In a devise of real estate to one for life, and from and after his death to three others, or to the survivors or survivor of them, their or his heirs and assigns, forever, the remaindermen take a vested interest at the death of the testator, and, consquently, though at the time of the decease of the tenant for life there be but one of the remaindermen surviving, he takes only one-third of the estate, and the heirs at law of the two others take the residue. The words of survivorship refer to the death of the testator, and not to the death of the tenant for life, unless from other parts of the will it be manifest that the intent of the testator was otherwise." *Moore v. Lyons,* 25 Wend. 119, reversing the judgment of the supreme court in the same case with NELSON, C. J., presiding.

That decision has frequently been sanctioned in New York. The reasoning of the dissenting opinion of Judge GROVER in *Moore v. Littel,* 41 N. Y. 66, 87–97, cited in the opinion on file in this case, gives support to the decision in this case. But the court in that case held:

"A grant to A. for life, and after his decease to his heirs and their assigns, forever, gives to the children of the latter a vested interest in the land, although liable to open and let in after-born children of A., and liable also (in respect of the interest of any child) to be wholly defeated by his death before his father. Such an interest, whether vested or contingent, is alienable during the life of A. (the tenant for life), and passed by deed or mortgage, subject only to open or be defeated in like manner as before."

To the same effect, *Griffin v. Shepard,* 124 N. Y. 70, 26 N. E. 339; *Campbell v. Stokes,* 142 N. Y. 23, 36 N. E. 811. Judge GROVER alone dissented from the last proposition quoted, and two other of the eight judges concurred in his dissent from the first proposition quoted. Speaking of that dissenting opinion, the same court, in a learned and dis-

criminating opinion, concurred in by all the judges, subsequently said:

"The court did not concur in the reasoning, or the conclusion to which it led. Followed steadily to its logical consequences, it would apparently take out of the operation of the statute a large class of future estates upon the ground that they are mere possibilities, and not estates at all. The collision at the bottom of that case was over the character of a contingent remainder limited to the heirs of a person then living. The majority of the court, founding their opinion upon the definitions of the Revised Statutes and their express authority, held that the children of John Jackson had, during his life, and notwithstanding the uncertainty of their ever living to be his heirs, an expectant estate, which could be aliened. The dissent went upon the ground that such children, during the life of the father, had no estate at all, but only the possibility of acquiring one, which, therefore, was not the subject of a conveyance." That case, as there said, "at least settled the question that such a contingent right as was devised to John Foley is within the definition of expectant estates, and governed by the provisions of the Revised Statutes. It is true that, to allow of title by descent, there must be something to descend; and what that is, in a case of contingent remainder, which may never vest either in interest or possession except a mere possibility of acquiring an estate, is a question which the mandate of the statute sufficiently answers, but which may also be answered on principle. John Foley had something more than a mere possibility of acquiring an estate. He had the fixed, absolute right to have the estate if the contingency occurred. That right was conferred by the will of the testator, and vested in him at the instant of the latter's death. The devisee held it as a vested right, but such a right as the contingent and uncertain character of the devise created; nevertheless a fixed and vested right, which the Revised Statutes recognize as an estate, placed in the category of expectant estates, and decree shall be descendible and which as we have already seen was descendible even at common law." *Hennessey v. Patterson,* 85 N. Y. 102, 103.

And so I think the logical consequences of the decision in this case are the same as that court so declared to be the logical consequences of Judge GROVER's dissenting opinion, and that is "that it takes out of the operation of the statute a large class of future estates upon the ground that they are mere possibilities, and not estates at all." To my mind, the language of the devise in this case is substantially the same as the devise in *Moore v. Lyons, supra,* and the grant in *Moore v. Littel, supra,* and should receive the same construction. So construed, the children had an interest capable of being conveyed by deed or mortgage during the life of the mother, subject only to open or be defeated, as mentioned. The decision of the court in *Moore v. Littel, supra,* has often been sanctioned in New York. The devise construed in *Livingston v. Greene,* 52 N. Y. 118, 123, was quite similar, and in that case PECKHAM, J., speaking for the whole court, said:

"The words 'after,' and 'upon the death of the wife,' and like words, do not make a contingency, but merely indicate when the remainder shall take effect in possession—the commencement of the enjoyment of the estate."

In that case the testator's children all survived him, but several of them died before the widow; and it was held "that the children took a vested remainder, not subject to be defeated by their death prior to that of the widow." To the same effect, *Embury v. Sheldon,* 68 N. Y. 227, 235, 236; *Kelso v. Lorillard,* 85 N. Y. 177; *In re Mahan,* 98 N. Y. 372, 376; *Byrnes v. Stillwell,* 103 N. Y. 453, 460–463, 9 N. E. 241. In *Kelly v. Kelly,* 61 N. Y. 47, the testator devised and bequeathed all his estate to his two children, and in case of the death of one the surviving child was to have the whole, and in case of the death of both the same was given to two nephews, with directions not to sell or mortgage until the youngest child should reach the age of twenty-one, and it was "held that the death referred to was one happening in the

lifetime of the testator; and that, he having died leaving the two children him surviving, they took a fee, and the limitation over was of no effect." In *Van Axte v. Fisher,* 117 N. Y. 401, 22 N. E. 943, the testator gave his residuary estate to his executor, in trust with power to sell and invest the proceeds and provide for and properly maintain D., and the balance on the death of D. was thereby given to J., who died before D., intestate, leaving children; and it was held that upon the death of the testator, J. took a vested remainder, subject to the exercise of the power of sale, and that upon the death of J. his interest descended to his issue. Thus it has been held:

"The words 'from and after,' used in a testamentary gift of a remainder, following a life estate, do not afford sufficient ground in themselves for adjudging that the remainder is contingent, and not vested; and, unless their meaning is enlarged by the context, they are to be regarded as defining the time of enjoyment simply, and not of the vesting of title. The presumption is that a testator intends that his dispositions shall take effect in enjoyment or interest at the date of his death; and upon the happening of that event, unless the language of the will by fair construction makes his gifts contingent, they will be regarded as vested. Words of survivorship and gifts over on the death of the primary beneficiary are to be construed, unless a contrary intention appears, as relating to the death of the testator." *Nelson v. Russell,* 135 N. Y. 137, 140, 31 N. E. 1008.

The case at bar is quite similar to *Stokes v. Weston,* 142 N. Y. 433, 37 N. E. 515:—"The will of S. gave to his wife the use of all his property for life, the remainder to his three children—two sons, who were unmarried, and a daughter, who was married and had two children. The will then provided that in case of the death of the sons, or either of them, without issue then living, the share of the ones so dying should be divided equally between the two grandchildren. . . . Held, that the death referred to was that of a son

during the lifetime of the testator, and, as they both survived him, they, with their sister, took the entire estate, subject to the life estate of the widow."

It was there also held:

"The law favors equality among children in the distribution of estates, and in case of doubtful construction of the language of a will it selects that which leads to such a result. So, also, the law favors the vesting of estates, and, in case a will contains apt words to dispose of the testator's entire estate, that construction will be given to it."

So the case at bar is quite similar to *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. 890:—"The will of a testator, who left a wife and children surviving, devised a life estate in his real property to his wife, and provided that from and after her decease the property should be disposed of according to the statutes governing the descent of real property. Held, that the heirs of the testator upon his death took a vested remainder in his real estate."

In that case the court also held:

"A remainder is not to be considered as contingent in any case where, consistently with the intention of the testator, it may be construed as being vested. The words 'from and after,' in a testamentary gift of a remainder following a life estate, do not make the remainder contingent, and prevent its being construed as vested, where there is nothing else on the face of the will tending to show that the vesting of the remainder was postponed or intended to be postponed beyond the death of the testator."

I have thus quoted at length from New York cases, because certain cases from that state are cited in support of the decision in this case. But, in my judgment, the decision in this case is in conflict with the settled law in New York, as appears from cases cited, and numerous others which might be cited, and also numerous prior rulings of this court. *Scott v. West*, 63 Wis. 533, 563–573, 593–595, 24 N. W. 161, 25 N. W. 18; *Baker v. McLeod's Estate*, 79 Wis. 534, 541–545,

48 N. W. 657; *Burnham v. Burnham,* 79 Wis. 557, 566, 567, 48 N. W. 661; *Patton v. Ludington,* 103 Wis. 629, 646–650, 79 N. W. 1073; *Smith v. Smith,* 116 Wis. 570, 93 N. W. 452. It has the support, however, of *In re Albiston's Estate,* 117 Wis. 272, 94 N. W. 169, in which I dissented. Id. It is true that the devise quoted was followed by this clause: "I also wish my sister Julia Dolan to have an equal share of the above property with my children *if she survives the death of my wife.*" But that did not prevent the estate from vesting in the children upon the death of the testator, subject to open and let in the sister Julia in case she should survive the death of the widow. This is in harmony with a number of the cases cited above, and many others which might be cited. *Moore v. Littel,* 41 N. Y. 83; *Griffin v. Shepard,* 124 N. Y. 70, 26 N. E. 339; *Campbell v. Stokes,* 142 N. Y. 23, 36 N. E. 811, and *Scott v. West,* 63 Wis. 529, 24 N. W. 161, 25 N. W. 18. As indicated in some of the cases cited, certain estates were vested under the New York statutes, from which ours were taken, which would not have been vested at common law. And yet, in my judgment, the estate in the case at bar was subject to the life estate and the conditions mentioned, not only vested in the children immediately upon the death of the testator, under the statutes, but also would have been so vested at common law. If not, then in whom is such estate vested in the case at bar? Certainly not in the tenant for life, the widow, for by the terms of the devise the estate which she took terminated on her death. There is no claim that the widow or any one else took the remainder of the estate in trust, and there is no ground for making any such a claim. Thus, we have, by virtue of the decision in this case, the anomaly of an estate in remainder without any remainderman and without any trustee to hold such title, which, it would seem, is to remain without an owner, in trust or otherwise, during the life of the widow. That is the question that confronted this court in

*Scott v. West, supra.* It was there held that upon the death of the testator the grandchildren then living took a vested remainder, subject to open and let in afterborn grandchildren, and to be divested by death without issue, notwithstanding the testator's daughters, as trustees, had the management of the estate during their lives and the life of the survivor of them. See pages 554, 555, 558, *et seq.*, 63 Wis., pages 165, 167, 24 N. W., and other pages cited above. To my mind it is very clear that upon the death of the testator the land in question became vested in the children, so that the same could be conveyed by them subject to the widow's life estate and the condition named.

The foregoing statement is sufficient to indicate the grounds upon which I dissent.

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## HANLON, Respondent, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

*May 9—May 29, 1903.*

*Street railways: Negligence: Personal injuries: Contributory negligence: Injuries to driver of fire apparatus: Due care: Collision at street crossing: Instructions to jury: Evidence: Witnesses: Cross-examination: Excessive damages.*

1. In an action for personal injuries to the driver of a hose cart it appeared, among other things, that plaintiff, driving rapidly in response to an alarm of fire, and in the line of his duties as fireman, came into collision with defendant's street car. There was evidence that the car was traveling at a speed of twenty to twenty-five miles an hour, and that nothing was done to check that speed until within twenty feet of collision, although plaintiff's team was in plain sight when the car was 100 feet from the crossing. *Held*, that it was inferable that the motorman neglected to keep any lookout ahead during a run of some eighty feet of approach, and a finding that defendant's servant negligently operated its car was justified.

2. In such case, it further appeared that plaintiff's horses, although on a run, were under perfect control, and might have been stopped before collision; that there was no failure on plaintiff's part to look, and no failure to see that which was physically apparent; that to serve the public purpose of his employment it was plaintiff's duty to seize every opportunity to make expedition, and take chances, in deference to the imperative necessity for speed, which would be wholly unjustifiable otherwise; that the gong on the hose cart was constantly sounded, justifying, in a considerable measure, confidence that crossings and corners would be clear when reached, and that it was undisputed that a uniform custom existed for the operators of street cars to give fire vehicles right of way, and slow down and stop to avoid collision. *Held*, that although it might have been negligence in law for a traveler under ordinary conditions to have taken the chance of crossing ahead of the car, still the circumstances surrounding plaintiff so differed, that whether plaintiff was guilty of contributory negligence in attempting to cross ahead of the approaching car, was properly a question for the jury.
3. In such case, it appearing that although the plaintiff's team was running, yet it was under perfect control, it is not error to refuse instructions to the jury, based on the assumption that plaintiff approached the crossing at such uncontrollable speed that he could not stop to avoid a collision.
4. In such case, a requested instruction, that the jury might absolutely find plaintiff guilty of contributory negligence, if they found there was such uncontrollable speed, is incorrect.
5. A requested instruction, in effect, that one approaching a street railway track, and having a reasonable opportunity to judge of the speed of an approaching car, is bound to know such speed, while it may state correctly an abstract rule of law applicable to ordinary circumstances, is misleading, where it appeared that as to fire vehicles there was a uniform custom of operators of cars to change their speed, either by slowing up or stopping, in order to give opportunity for such vehicles to pass.
6. Such instruction is further erroneous and misleading in that it requires every man "having a reasonable opportunity to judge" that he judge correctly, and "know" the correct speed. He must observe what is perceptible and must reach the conclusion of an ordinary man, and not the infallible one. Beyond this the law does not charge him with knowledge.
7. A requested instruction, to the effect, that one approaching a car track must, in the exercise of ordinary care, look and listen

for an approaching car, and continue so to look and listen up to the last moment that such acts would be of any virtue in preventing a collision with a car, has no application to a case where the evidence establishes, without controversy, that plaintiff did look and see and know all that could have been ascertained by the utmost vigilance.

8. Such instruction is, however, faulty in that it lacks the qualification that one must look and listen *if he have opportunity so to do.*

9. In instructions to the jury the expressions "the great mass or majority of mankind," and its type, "the man of ordinary care and prudence," are entire equivalents, and properly used interchangeably.

10. In an action for injuries to the driver of a hose cart, en route to a fire, by collision with a street car, it was undisputed that it was the uniform custom of street cars to stop or slacken speed, and give fire apparatus the right of way. *Held*, that it was not error to instruct the jury that, inasmuch as such custom had been established beyond controversy, plaintiff had a right to assume that defendant's servants would comply therewith.

11. In an action for injuries to the driver of a hose cart in collision with a street car, evidence of a witness, that sitting on a sidewalk he had frequently heard the gong of the fire patrol wagon, described as similar to the gong on the hose cart, a distance of two blocks, is not objectionable on the ground that the conditions surrounding the witness were not identical with those surrounding the motorman.

12. In an action for injuries by collision with a street car, the speed of the car was estimated at varying rates up to twenty-five miles an hour. The motorman had testified on direct examination that the speed was only seven or eight miles an hour; that the ninth notch of the power lever was the ultimate speed of the car, and that he had it at the eighth. *Held*, that it was not error to permit, on cross-examination, the question whether or not the car in question was not a specially rapid one, to which the motorman answered that, while not the most rapid, there were only two others that excelled it.

13. Plaintiff, a fireman, thirty-seven years of age, who had been in the fire department nine years, and had attained the rank of captain, with a salary of $100 per month, was injured in a collision with a street car. His knee-joint was permanently loosened and enfeebled, and his chest crushed, ribs being broken both in front and rear, penetrating not only the outer membrane, but the pericardium, leaving adhesions which would

**permanently and seriously interfere with any violent exertions. His expenses for medical treatment had been about $500. His sufferings had been great and he still continued to suffer two years after the injury. He retained his place in the fire department, but was unable to perform certain of the work necessary in fighting fires.** ***Held:***

**(1) That the jury might properly find that his earning capacity was impaired.**

**(2) That a verdict of $4,000 was not excessive.**

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The plaintiff, on October 17, 1900, was, and had been for a considerable time, a member of the fire department of Milwaukee. On that day, in response to an alarm of fire, and in performance of his duty, he proceeded to drive his hose wagon southward on Sixteenth street and across Vliet street, rapidly, as usual, some seven or eight miles an hour, sounding the rotary gong thereon, which, according to the evidence, was audible at a distance from two to eight blocks away. When he reached the north side of Vliet street, he discovered defendant's street car at a distance variously stated up to 100 feet east of the crossing, headed westward. It had been a uniform custom in Milwaukee for many years for the street cars to slacken or stop so as to give right of way to the fire department vehicles. Plaintiff assumed that the car would so stop, urged forward his galloping horses, but, as he got within a few feet of the track, saw that the car had not stopped nor slowed up, and attempted to swerve his horses westward, but was too near to turn without coming upon the track, and a violent collision occurred, throwing him to the ground and causing him injuries. There was evidence that the speed of the car was from eight to twenty-five miles an hour, and did not at all diminish up to the time of the collision, although the motorman claims to have immediately, upon seeing the hose cart, attempted to stop his car. By a

special verdict the jury found that at and prior to the collision the car was running at a greater speed than was consistent with ordinary care, which was the proximate cause of the injury, and that the defendant was guilty of want of ordinary care, which was the proximate cause of the injury; that the hose cart was not being driven at a negligent speed; and that the plaintiff was guilty of no want of ordinary care which contributed to the injury; and that the damages were $4,000. Defendant moved for direction of a verdict, and after verdict moved to strike out and reverse the answers to the questions inquiring as to the negligent speed of the hose cart and the negligence of the plaintiff, and for judgment in its favor upon such amended verdict. Defendant also moved for a new trial. All of said motions were overruled, and judgment for the plaintiff entered, from which the defendant appeals.

For the appellant there was a brief by *Spooner & Rosecrantz,* and oral argument by *C. N. Rosecrantz.*

For the respondent there was a brief by *Dorr & Gregory,* and oral argument by *T. H. Dorr.*

DODGE, J. The finding that the defendant's servant negligently operated its car is not seriously controverted. In its support there was evidence of extraordinary speed—twenty to twenty-five miles per hour—and that nothing was done to check that speed till within some twenty feet of collision, although the plaintiff's team was in plain sight when the car was 100 feet from the crossing, and although his gong had been regularly sounded for several blocks. Indeed, it is inferable that the motorman neglected to keep any lookout ahead during a run of some eighty feet of approach to the crossing, for he failed to see plaintiff's team and vehicle until close to them. The chief contention is that plaintiff's conduct, as conceded or conclusively established, constituted contributory negligence.

The primary question argued is whether facts and circumstances surrounding the plaintiff at the time of and just before his injuries varied so radically from those surrounding the ordinary traveler that what would have been negligence in the latter *per se* as matter of law might by reasonable minds be deemed consistent with the care to be expected of the ordinarily prudent man under such circumstances as are shown in this record. That the same acts may be either careful or negligent according to the variant circumstances is elementary. *Boelter v. Ross L. Co.* 103 Wis. 324, 330, 79 N. W. 243; *Warden v. Miller,* 112 Wis. 67, 87 N. W. 828; *Yerkes v. N. P. R. Co.* 112 Wis. 184, 193, 88 N. W. 33. This court, in common with many, if not most, others of last resort, has declared that certain acts are so obviously and notoriously variant from the conduct of persons of ordinary prudence at railway crossings under all ordinary circumstances that reasonable minds cannot honestly differ as to whether they are negligence; hence that they must be so held as matter of law. Among these are the omission to look and listen for an approaching car when the opportunity to do so exists; also the needless attempt to make the crossing ahead of the car or engine with knowledge of its approach in such proximity and at such speed as to make the attempt dangerous. *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 465, 82 N. W. 295; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 156, 85 N. W. 663; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 346, 85 N. W. 1036. In the last case it is declared negligence to attempt to cross when collision is probable, unless the speed of the car be greatly slackened. In this connection it is also settled in *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 608, 84 N. W. 823, that the ordinary traveler is not necessarily negligent if, calculating reasonably, he has time to cross safely without interfering with the movement of the car, assuming it is moving at a reasonable rate of speed

or at the higher actual rate, if known to him. This conclusion was reached as a corollary of the proposition that, as between the general traveling public and the street car, the former have neither right to interrupt the latter's course to enable them to cross, nor reason to expect that the operator will so manage the car as to give them opportunity, for cars are not usually so managed, and cannot be consistently with the duty of rapid transportation which they serve. Another consideration, written into several of the above cases, which has been forceful in leading to conclusion of negligence from an attempt to make the crossing in a doubtful case, is the very slight measure of inconvenience to the ordinary traveler in pausing to give the car way, as compared with the peril of attempting the crossing.

In the light of the principles and rules of law thus established, let us consider whether the circumstances surrounding plaintiff were such that they might legally differentiate the situation from the ordinary one as to the conduct reasonably to be expected from the man of ordinary prudence. We must first eliminate one asserted element of conduct which is made the basis of much of appellant's argument in supporting both his claim for a directed verdict and certain requested instructions; that is, that plaintiff approached Vliet street at such speed, and with his horses so beyond control, that he could not have stopped to avoid collision, although the car had been on the crossing without negligence of the motorman. We do not find it necessary to decide whether such conduct would constitute negligence, for we find no proof of it. The evidence is without dispute that, although driving rapidly, with horses on a run, as his duty required, plaintiff still had them under perfect control, and had already checked them so that he might have stopped at the time when he sighted the car, ninety to 100 feet away, when he decided that he had sufficient time to cross ahead of it. Again, there was no failure of the duty to look, and no failure to see that

which was physically apparent. At the moment that he reached the building line on the north side of Vliet street he looked, and saw this car. Hence the question is whether an irresistible and indubitable inference of negligence arises from the fact that he gave head to his horses, and attempted to make the crossing. Among those things which distinguish the conduct of the driver of fire apparatus from others is, primarily, the duty and necessity of great speed. The loss of moments may mean destruction of lives or property. The public purpose which such men and appliances serve would be defeated by the hesitation and caution which does and should characterize the ordinary traveler. To serve this public purpose, the driver must and does seize every opportunity to make expedition. He takes chances, in deference to the imperative necessity for speed, which would be wholly unjustifiable otherwise. These things firemen do. These things they must do. The conclusion seems irresistible, either that they are consistent with ordinary care under those circumstances, or that the ordinarily prudent man cannot hold a position in the fire department. Another distinguishing circumstance is the persistent alarm which precedes the fire vehicle. The clamor of its gong is a penetrating, far-reaching sound, so entirely distinct from the other sounds of a city street as to force attention at once. That circumstance, of course, greatly diminishes the hazard resulting from the speed, as it serves to clear the way of obstacles, and justifies a considerable measure of confidence that crossings and corners will be clear when reached. Another and most important distinction, certainly as applied to plaintiff's conduct, is the undisputed and uniform custom of the operators of street cars to give the fire vehicles right of way, and to slow down and stop to avoid collision. This is just what the ordinary traveler has no justification in expecting. His duty, as pointed out in the *Tesch* and *Stafford Cases,* is to govern his conduct upon the expectation that the car will continue at

the speed at which it is traveling when he observes it. The ordinarily prudent man acts in the light of his experience of what is customary and usual. If the uniform custom were to hold cars back from a crossing to enable him to pass over, he would probably deem it safe to proceed when he believed that his approach was seen by the motorman, and the car was far enough away to permit the usual efforts to have effect. As that is not usual, a contrary rule of conduct is and must be observed by the ordinarily prudent traveler. On the other hand, it is held to be consistent with due care for the motorman under such circumstances to approach crossings, even at such speed that he may be unable to avert collision with passers, merely because he has a right, based on experience, to expect that travelers will not come in his way when his car is in sight and his gong sounded to warn them. We are of opinion that it is not beyond reason for a jury to conclude that the plaintiff, after having given warning of his approach by such clamor of his gong that it was heard by people shut up in houses while he was still a block or more away, and when he drove out from Sixteenth street into plain sight of the motorman ninety feet away, might have believed reasonably that his presence was known, and might reasonably have expected that the usual and customary efforts to keep the car back from collision would be made. If that had been done, there is no pretense but the wagon could have passed in safety; hence a decision to make the attempt would not have been unreasonable. In other words, we hold that, although it might have been negligence in law for a traveler under ordinary conditions to have taken the chance of crossing ahead of a car in the proximity and at the speed of this one, still the circumstances surrounding plaintiff so differed that reasonable minds might consider the same attempt by him within the bounds of due care; hence that the question was one properly for the jury.

Only four decided cases with reference to street-crossing

collisions with fire-department vehicles have been brought to our notice. Of these *Warren v. Mendenhall,* 77 Minn. 145, 79 N. W. 661, and *Decker v. Brooklyn Heights R. Co.* 72 N. Y. Supp. 229, hold squarely that the circumstances surrounding the drivers are marked by material distinctions from those around other travelers, and that what would be negligence *per se* in the latter may well be open to a contrary conclusion in the case of the former. They fully support our view as above stated. On the other hand are urged upon us by the appellant *Greenwood v. P. W. & B. R. Co.* 124 Pa. St. 572, 17 Atl. 188, and *Garrity v. Detroit C. St. R. Co.* 112 Mich. 369, 70 N. W. 1018. In the former of these the collision was with a steam railway train, where, of course, neither could the fireman's gong give any warning, nor was there any custom, nor, indeed, possibility, that the train should be slowed down or stopped after the wagon was in sight. The court held that the mere necessity for speed was not sufficient to absolve the driver from a duty to look for an approaching train, when, as there, he had full and practical opportunity to do so. In the *Michigan case* it was said to be against public policy, and therefore negligence *per se,* to drive through city streets at such speed as to make evasion of obstacles at crossings impossible; but the case was held to have been properly one for the jury, because it was within reasonable judgment and prudence to attempt to cross ahead of a car 100 to 150 feet away when the driver first sighted it—a holding that would support the view that plaintiff's negligence was properly a jury question in this case. In *Magee v. West End St. R. Co.* 151 Mass. 240, 23 N. E. 1102, the court holds that the duty of haste resting on a fireman constitutes a distinguishing circumstance which might warrant a finding of due care in his case, though not in case of one not in such exigency. This was applied to plaintiff's manner of riding on a truck while adjusting his equipments. In *Flynn v. Louisville R. Co.* (Ky.) 62 S. W. 490, the court

expresses views generally in recognition of sufficiency of the necessity for speed and existence of right of way over cars to exculpate a driver of a salvage wagon attempting the crossing, but the case turned upon the supervening negligence of the motorman, and the question of contributory negligence in plaintiff was not authoritatively decided. The result of these decided cases from other courts is to confirm the view already expressed that the question whether, under all the circumstances, plaintiff was guilty of contributory negligence in attempting to cross Vliet street ahead of the approaching car, was properly for the jury.

Error is assigned upon the refusal to give certain instructions, both with reference to defendant's negligence and plaintiff's contributory negligence, based upon an assumption that the jury might have found from the evidence that plaintiff approached Vliet street with his horses at such uncontrollable speed that he could not stop to avoid a collision. We have already stated that such an assumption has no support in the record. There is no evidence of any such condition of things. Further, the instructions requested with reference to the question of contributory negligence were incorrect, in that they required the jury absolutely to answer such questions in the affirmative if they found that there was such uncontrolled speed. As pointed out in *Garrity v. Detroit C. St. R. Co.*, on which appellant seems to rely, such speed might or might not have been contributory negligence. It might or might not have contributed to the collision; for if, when plaintiff reached Vliet street, and saw the car, it was consistent with ordinary care under all the circumstances for him to decide that it was safe to cross ahead of it, then the attempt so to do might not be negligence, although the event did not justify it (*Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823); especially if, as the evidence tended to prove, the collision was due to conduct on the part of the motorman such as an ordinarily pru-

dent person, driving a fire vehicle, would not have anticipated. In such case the antecedent rapidity of approach would have no causal connection with the collision. No error was committed in refusing these requests.

Another instruction was requested to the effect that one approaching a street railroad track, and "having a reasonable opportunity to judge of the speed of an approaching car, is bound to know such speed, and cannot assume that it is running at a speed consistent with ordinary care and proceed upon that assumption." Assuming that this instruction correctly states an abstract rule of law applicable to ordinary circumstances, it would be highly misleading in a case of this sort, where there were additional circumstances naturally affecting the driver's conduct; most prominent among them the custom of operators of cars to change their speed, either by slowing up or stopping, in order to give opportunity for the fire vehicle to pass. The man who has a right, in the exercise of ordinary prudence, to assume that such efforts will be made and be effective, is not necessarily negligent because he attempted to pass in front of a car, although it would be likely to collide with him if it continued at its known speed. As is said in the *Tesch Case,* the ordinary traveler has no right, in the exercise of a reasonable prudence, to indulge such expectation; but the driver of a fire department vehicle has, if he has reason to believe that his presence is known to the motorman. This instruction is, however, erroneous and misleading in another respect. It requires of every man "having a reasonable opportunity to judge" that he judge correctly, and "know" the correct speed. This goes beyond any authority in this or other courts. He is obliged to know that which the ordinarily prudent and intelligent man would know under the circumstances. Having, as the court said, reasonable opportunity to judge, he must reach the conclusion of the ordinary man, and not the infallible one. These suggestions are especially applicable to one who gets but a

glance of a car or train approaching him nearly head on, for he is not at all well situated to observe accurately the speed. He must observe what is perceptible, but beyond this the law does not charge him with knowledge.

Another request for instruction was to the effect that one approaching a car track "must, in the exercise of ordinary care, look and listen for an approaching car, and continue so to look and listen up to the last moment that such acts would be of any virtue in preventing a collision with a car." Conceding that this is a correct abstract rule, as in most of its language it is, yet it has no application to the present case, for the evidence establishes without controversy that the plaintiff did look and see and know all that could have been ascertained by the utmost vigilance. The instruction is, however, faulty, and faulty in a respect relevant to the situation here. It lacks the qualification that one must look and listen *if he have opportunity so to do.* There is possibility, especially with one managing a team and vehicle, that his continued observation of the track in either direction may be at least morally impossible; that his attention may be not diverted, as has been incorrectly said in one or two cases, but absolutely forced away from watchfulness. For example, in this case it was just as essential to plaintiff's due care that he should look westward for an approaching car as that he should look eastward, and the only intimation in the evidence of any diversion of his attention from the car which struck him was for the purpose of the exercise of this duty. If this instruction required him, from the moment he was in position to see up or down Vliet street, to keep his eyes fastened on this particular car, and to govern his conduct without informing himself as to the condition of things in the other direction, it of course contains its own refutation, for that would necessarily be negligence. The possibility of the forcing away of one's attention as an excuse for continued watchfulness is discussed in *Guhl v. Whitcomb,* 109 Wis. 69, 74,

85 N. W. 142, where the previous cases were collected, and where it was pointed out that no ordinary or trifling circumstance could justify diversion or withdrawal of attention; yet, where the circumstances so forced it away, it might be well held that a plaintiff had not the opportunity to look or listen.

Error is predicated upon the charge given in the following words:

"By ordinary care is meant such care as a man of ordinary care and prudence would have exercised under circumstances like to those disclosed by the testimony in this case."

The criticism seems to be that the charge would have suited appellant's taste better had the expression "the great mass or majority of mankind" been used instead of "a man of ordinary prudence." The instruction assailed is strictly accurate. It seems that we ought by this time to be absolved from the necessity of repeating that the two expressions, "the great mass or majority of mankind," and its type, "the man of ordinary care and prudence," are entire equivalents, and properly used interchangeably. *Yerkes v. N. P. R. Co.* 112 Wis. 184, 193, 88 N. W. 33.

Another instruction complained of is to the effect that, it having been established beyond controversy that the custom was uniform for the street cars to stop or slacken speed, so as to permit fire apparatus to cross the streets when their approach was known, the plaintiff had a right to assume that the defendant's servants would so conduct themselves, if they knew, or, in the exercise of ordinary care ought to have known, of his vehicle's approach. The complaint seems to be that the court told the jury that this custom was established by undisputed evidence. It certainly was, and in so stating we can discover no error. The same is true of the fact that plaintiff was responding to a fire alarm. In these respects we cannot concur with the appellant's criticism. That the right to make such assumption exists certainly has

support from *Watermolen v. Fox River E. R. & P. Co.* 110 Wis., at page 159, 85 N. W. 663, *Stafford v. Chippewa Valley E. R. Co.* 110 Wis., at page 361, 85 N. W. 1036, and other cases which declare that the motorman of a street car has a right to assume that persons approaching a street crossing will exercise the usual and customary precautions, and may operate his car accordingly without guilt of negligence.

Error is assigned upon permitting a witness to testify that, sitting on a sidewalk, he had frequently heard the gong of the fire patrol wagon, which was described as similar to the gong on the plaintiff's wagon, at a distance of two blocks. The complaint seems to be that the conditions surrounding the witness were not identical with those surrounding the motorman. This, of course, is true, but we do not think it rendered the evidence inadmissible. It was a circumstance bearing upon its weight. The record is full of testimony, given without objection, from witnesses who heard the gong of this vehicle at varying distances and under varying circumstances of opportunity. It would be far too restrictive a rule that, in order to give the jury benefit of experience as to the effect of such gongs in giving distant warning, the witness must have been in exactly the same situation as the person claimed to have been warned on the particular occasion. All of the circumstances surrounding each witness being before the jury, the inference as to the efficacy of the sound became a question of fact for them to resolve as reasonably intelligent men.

Further error is assigned upon permitting cross-examination of the motorman as to whether the car in question was not a specially rapid one; he finally stated that, while not the most rapid, there were only two others which excelled it. The situation at the time this testimony was taken was that several witnesses had described the speed of the car at varying rates up to twenty-five miles an hour. The motorman himself had testified that he had his power lever thrown open

to the second highest notch; that the ninth notch was the ultimate speed of the car, and that he had it at the eighth notch. In this situation, the ability of the car to make great speed was certainly a legitimate fact to be drawn out in testing the accuracy of this same witness, who had claimed that his speed was only seven or eight miles an hour. No error was committed in permitting him to be so cross-examined.

The damages are assailed as excessive, and in that connection complaint is made of an instruction which permitted the jury to consider plaintiff's loss of earning capacity for the future. The plaintiff was thirty-seven years old, had been in the fire department some nine years, and attained the rank of captain, with a salary of $100 per month. The injuries suffered were a permanently loosened and enfeebled knee joint, the crushing in of the chest, ribs being broken both in front and rear and penetrating not only the outer membrane, but the pericardium itself, leaving adhesions between these membranes which the physicians declared were certain to be permanent, and to interfere seriously with any violent exertions, while suffering might not be great in the case of moderate exertions. His expenses of cure had been about $500. His sufferings had been great, and had continued in some degree up to the time of the trial, two years after the injury. He still occupied his place in the fire department, but found it extremely difficult, by reason of his injuries, to perform certain of the work necessary in fighting fires. In this situation it is impossible to say that there was no evidence from which the jury might have found his earning capacity was impaired. His profession, in which he had attained high standing and high compensation, called for extreme physical vigor. He could not hope to progress, nor, probably, to retain his then position permanently, with the impairment which the evidence tended to disclose. At least the jury might legitimately have drawn such inference. Of course, they had the advantage of opportunity to observe the

man himself upon the stand before them. In view of all these considerations, we feel unable to say that the damages exceed what the jury might have believed proper compensation for all the injuries suffered, without passion or prejudice, and cannot, therefore, hold that error was committed by the trial court in ordering judgment for the amount so found.

We find no error which should reverse the judgment.

*By the Court.*—Judgment affirmed.

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ATWILL, Appellant, vs. BLATZ and others, Executors, Respondents.

*May 9—May 29, 1903.*

*Landlord and tenant: Dangerous premises: Injury to a pedestrian: Liability of tenant: Nonsuit.*

1. When snow has been allowed to accumulate on the roof of a building in the occupancy and control of a tenant, and it falls therefrom and injures a pedestrian, if liability exists therefor, the tenant, and not the landlord, is liable.
2. In such case, in an action against the landlord alone, it is not error to grant a nonsuit.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Appeal from a judgment of nonsuit and for costs. The defendants were the executors of the estate of Valentine Blatz, deceased. The premises in question—a part of said estate—are located at the northwest corner of First avenue and Mineral street, in the city of Milwaukee. A portion of the buildings upon the premises abut on Mineral street. The roof of this portion slopes toward Mineral street. The plaintiff alleges that defendants were negligent in failing to prevent snow and ice from accumulating on said roof, and in neglecting to remove the same, and that he was injured as a

result of such negligence. This the defendants deny, and allege that the premises in question were in the possession and occupancy of a tenant, under a written lease, at the time plaintiff claims to have been injured. The evidence presented in the record establishes the following facts: Plaintiff was injured by an accumulation of snow and ice falling on him while traveling on the sidewalk on Mineral street, adjacent to the building on said premises. The structures on the lot in question consist of a main building or hall, and an addition thereto which abutted on Mineral street. Such addition was covered with a tin roof, joined to the main structure in the usual manner; the pitch of the roof being much less than on the other parts of the structures. It also appears that the snow and ice which struck plaintiff fell from the tin roof covering this addition. At the time of the accident, one Henry W. Beckman was in possession and control of the saloon part of the main building and of the addition, by virtue of a written lease. He occupied the addition as a dwelling, and for the purposes of such business as he chose to conduct therein in connection with the public uses that were made of the main hall. There is no evidence in the record tending to prove that the buildings upon the lot projected into Mineral street.

The cause was submitted for the appellant on the briefs of *Griffin, Johnston & Worden,* and for the respondents on that of *Fiebing & Killilea.*

Siebecker, J. Mr. Beckman's possession and occupancy of the addition to the main building on the premises in question, abutting on Mineral street, must be held to cover the addition, with the roof thereon. It appears that the relationship of landlord and tenant existed between him and defendants, as executors of said estate, by virtue of the written lease and his occupancy of said addition, at and prior to the time of the accident. His possession of this addition as such lessee

gave him the control of the roof as well as the interior. As a result of the tenant's possession and occupancy, he stands in place of the landlord in the management and control of the premises. If legal responsibility is to attach under the facts and circumstances as presented by the record in this case, it would devolve upon the tenant to exercise the reasonable care required to protect travelers on the abutting street from dangers incident to snow and ice accumulating and falling from the roof. *Leonard v. Storer,* 115 Mass. 86; *Boston v. Gray,* 144 Mass. 53, 10 N. E. 509; *Lee v. McLaughlin,* 86 Me. 410, 30 Atl. 65; Wood, Nuisances, § 116; Shearman & Redfield, Negl. § 713. The proof in the record warrants no inference other than that the snow and ice which plaintiff claims fell upon him came from the portion of the structures on the premises which was at the time in the occupancy and control of the tenant. The nonsuit was properly granted.

*By the Court.*—Judgment affirmed.

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SCHULTZ, Appellant, vs. SCHULTZ and another, Respondents.

*May 9—May 29, 1903.*

*Former judgment:* Res adjudicata.

S.'s husband gave plaintiff a mortgage on his homestead, in which S. did not join, which was void by virtue of the provisions of sec. 2203, Stats. 1898. Thereafter S. procured a divorce, and the judgment awarding alimony adjudged payment thereof to be a charge as a lien on such homestead. Plaintiff thereafter sought to foreclose his mortgage, alleging that it secured the repayment of purchase money, and made S. a party, who set up her lien by virtue of said divorce judgment, and, after full hearing, judgment was entered dismissing the complaint. In a subsequent action plaintiff sought to have his lien for the purchase money adjudged prior to S.'s lien for alimony, on the

**ground that it was for purchase money, and in that action S., having been made a party, pleaded the former judgment. *Held*, that the question was *res adjudicata*, and binding on the plaintiff.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was brought to have $1,050, alleged to have been advanced by the plaintiff to the defendant *William Schultz* in the year 1889 to pay the purchase price of the lot described, and $46.40, paid by the plaintiff for taxes on the premises in 1895 and 1896, adjudged to be a lien upon said premises prior to and paramount to the lien or claim of the defendant *Augusta Schultz,* whether by the judgment of divorce which she obtained from the defendant *William Schultz* April 3, 1897, or otherwise. It appears and is undisputed that May 10, 1890, the defendant *Augusta* married the defendant *William;* that the plaintiff is a brother of *William;* that June 15, 1896, *William* gave to the plaintiff his note for $1,500, to cover the advances so made by the plaintiff to *William,* and interest thereon and taxes, and at the same time *William* gave to the plaintiff a mortgage on said lot to secure the payment of said note; that August 22, 1896, *Augusta* commenced an action against *William* for a divorce on the ground of cruel and inhuman treatment; that April 3, 1897, judgment of divorce was granted and rendered in favor of *Augusta* and against *William* on the ground of such cruel and inhuman treatment committed June 20, 1894, by reason of which *Augusta* was then forced to separate from and live apart from *William,* and continued thereafter to so live separate from him; that in that judgment of divorce there was allowed to *Augusta* out of the estate of *William* $1,500 as alimony, payable within thirty days after the entry of such judgment, and therein adjudged that such payment was to be charged as a lien upon said lot and the dwell-

ing house thereon, and that in default in such payment the same be enforced by execution; that some time after the rendition of such judgment of divorce the plaintiff commenced an action to foreclose the note and mortgage so given to him by *William;* that it was alleged, in effect, in the complaint in that foreclosure action, that the mortgage was so given to secure the payment of $1,500, being a part of the purchase price of the lot advanced and loaned by the plaintiff to *William,* for the express purpose of paying a part of such purchase price on the purchase of the lot by *William* from one John J. Rothers, to whom said money was paid. *Augusta* was made defendant in such foreclosure action, and served her separate answer therein August 24, 1897, and which answer consists of admissions and denials and counter allegations, in effect, setting up such judgment of divorce and the allowance of alimony and the charge and lien thereof upon the lot; that the note and mortgage were executed in fraud, and for the purpose of defeating any and all her rights in the lot by virtue of said judgment of divorce and her dower and homestead interest in the lot, which at the time of the execution of the mortgage was a homestead, and has since continued to be; and that the mortgage was executed without her knowledge, consent, or signature, and contrary to and in violation of sec. 2203, R. S. 1878. At the close of the trial of the issues so made in the foreclosure action, and on February 11, 1898, the court found, among other things, in effect, that the plaintiff had failed to prove the allegations of his complaint therein to the effect that the note and mortgage were so given to secure the payment of the purchase price of $1,500 for the lot advanced and loaned by the plaintiff to *William* for the express purpose of paying such purchase price; and further found, in effect, that the several allegations so contained in the answer of *Augusta* had been proven, and were true. And as conclusions of law the court found, in effect, that the moneys claimed to have been advanced by

the plaintiff to *William* were not for the purchase of the lot; that the mortgage was null and void, and should be discharged of record; that the complaint therein should be dismissed, with costs; and that the lien upon the lot given to *Augusta* by the judgment of divorce should be prior to any and all liens of the plaintiff on the lot, and judgment was entered therein accordingly. Thereupon, and on July 8, 1898, the plaintiff commenced this action to have the money so advanced and loaned by the plaintiff to *William* in 1889 adjudged to be a lien on the lot prior and paramount to the lien adjudged to *Augusta* in the divorce judgment. The defendant *Augusta* answered the complaint in this action by way of admissions, denials, and counter allegations, and alleges, in effect, the judgment in the foreclosure action, and that the moneys so advanced and paid by the plaintiff to *William* were not for the purchase price of the lot, and that her lien by virtue of the divorce judgment was prior to any and all claims of the plaintiff to the land, and that the judgment in the foreclosure action was still in force and unreversed. At the close of the trial of such issues the court found, in effect, that the money advanced and loaned by the plaintiff to *William* and evidenced by the $1,500 note and mortgage was not paid nor caused to be paid as part of the purchase money of the lot in question; that the issues of fact respecting the same were duly heard, litigated, tried, and determined in the foreclosure action; that all claims relating to the question of the purchase-price money claimed by the plaintiff in this action were also litigated in that action, and heard, tried, and determined therein, and related to the same property described in the complaint in this action; that it was therein determined that the lien given to *Augusta* in the divorce judgment was therein made a prior lien to any and all claims of the plaintiff to the lot, or any part thereof, and that no appeal had been taken from the judgment in the foreclosure action. And as a conclusion of law the court found that the judgment

in the foreclosure action is a bar to this action, that the lien given to *Augusta* in the divorce judgment is prior to and superior to any and all claims for lien by the plaintiff in this action, and that she is entitled to judgment dismissing the complaint herein, with costs, and ordered judgment accordingly. From the judgment so entered the plaintiff brings this appeal.

For the appellant the cause was submitted on the brief of *A. C. Umbreit,* attorney, and *Hoyt, Doe, Umbreit & Olwell,* of counsel.

*Carl Runge,* for the respondents.

CASSODAY, C. J. Two courts have found that the money advanced and loaned by the plaintiff to the defendant *William* was not so paid nor caused to be paid as a part of the purchase price of the lot. Nevertheless, counsel for the plaintiff contends that the finding should have been the other way. It is unnecessary to determine the question here, since the whole question was at issue and fully determined in the foreclosure action. The defendant *Augusta* was a defendant in that action. The plaintiff's complaint therein alleged that she had, or claimed to have, some interest in or lien upon the mortgaged premises, or some part thereof, which interest or lien, if any, had accrued subsequently to the lien of the mortgage. *Augusta* was the wife of *William* at the time he gave the note and mortgage, and had been for six years, but she did not sign the mortgage, notwithstanding it was upon their homestead; and the statute (sec. 2203) made it void without her signature, unless it was given to secure purchase money. And so, to get a lien upon such homestead prior and paramount to any lien or claim of *Augusta,* the complaint in the foreclosure action alleged, as mentioned in the foregoing statement, that the mortgage was given to secure the payment of part of the purchase price of the land. *Augusta* answered, and took issue with such allegation. After full hearing, the

court decided in her favor, and dismissed the foreclosure action. There can be no question but that the judgment entered therein is *res adjudicata,* and binding upon the plaintiff. *Keystone L. Co. v. Kolman,* 103 Wis. 300, 303, 79 N. W. 224, and cases there cited; *Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599; *South Bend C. P. Co. v. George C. Cribb Co.* 105 Wis. 445, 81 N. W. 675; *Huebschmann v. Cotzhausen,* 107 Wis. 64, 73, 82 N. W. 720. It follows that the court properly rendered judgment in this case in favor of the defendant *Augusta* and against the plaintiff.

*By the Court.*—The judgment of the circuit court is affirmed.

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SCHOOL DISTRICT NUMBER NINE, TOWN OF LAKE, Appellant, vs. SCHOOL DISTRICT NUMBER FIVE, TOWN OF LAKE, Respondent.

*May 9—May 29, 1903.*

***Schools and school districts: Division: Property rights: "Property," in statute: "Credits," in statute: Action for money had and received.***

1. A tax voted by a school district before, but the warrant for the collection of which was not required to be delivered into the treasurer's hands until after, the formation of a new district, embracing in part the territory of the original district, is not "property," within the calls of sec. 420, Stats. 1898 (providing that if a new district be formed from another, possessed of a school house, or "entitled to other property," the town board "at the time of forming such new district" shall determine the proportion of the value thereof to which the new district is entitled).
2. A tax voted before, but collected after, the formation of a new school district from another district, all such tax going into the treasury of the old district, is a "credit" of such original district, within the calls of sec. 944, Stats. 1898 (providing that territory detached from any municipality shall receive from the

**remaining portion "its just share of the credits" of such municipality).**

**3. In such case, an action for money had and received to the use of the new district is an appropriate form of action to enforce the liability under said sec. 944.**

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

This is an action to recover for money had and received. The complaint alleges that the parties to the action are both school districts in the town of Lake, Milwaukee county; that prior to August 28, 1901, the territory of the plaintiff district was a part of the defendant district and of another district in said town, and that on said last-named date the town board created the plaintiff district by an order which, owing to the want of consent of the district officers of the two districts from which plaintiff district was taken, did not go into effect until November 28, 1901; that an appeal was taken from the order dividing the district to the state superintendent of public instruction, who affirmed the action of the town board December 3, 1901; that the plaintiff district was lawfully organized by the election of officers December 21, 1901, and has maintained a school since February 6, 1902; that the defendant district at the annual school meeting July 1, 1901, by a resolution, voted to raise by taxation for school purposes the sum of $3,084 for the ensuing year, which sum was afterwards collected by the proper officers and paid into the defendant's treasury; that the value of the taxable property included within the plaintiff district, and which had been within the defendant district prior to the division, was 39.60 per cent. of the total taxable property of the defendant district as the same existed July 1, 1901, and that the sum of $1,223.97 out of the sum of $3,084 was collected from property within the limits of the plaintiff district, and lawfully belongs to the plaintiff; that proper demand was made for said sum prior to the commencement of this action; and that payment thereof was refused. Trial by jury was waived,

and, after a witness had been sworn for the plaintiff, the defendant objected to the introduction of any testimony under the complaint, on the ground that no cause of action was stated therein, and that the court had no jurisdiction of the subject, which objection was sustained on the ground that the complaint fails to state a cause of action, and leave was granted to the plaintiff to amend its complaint upon terms. The plaintiff, however, elected not to amend the complaint, whereupon the action was dismissed, and the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Bow & Ferguson,* and for the respondent on that of *Wheeler & Perry.*

WINSLOW, J. It appears by the complaint in the present case that the plaintiff school district was created August 28, 1901, by an order of the town board which took effect November 28, 1901, and that a part of its territory was taken from the defendant district; that at the annual school meeting of the defendant district held in July, 1901, a tax of $3,084 for school purposes was voted, which sum was afterwards collected in due course, and is in defendant's treasury; that, according to the equalized assessed valuations of the property in the old district before division, the sum of $1,223.97 of said tax was levied upon and collected from property in the plaintiff district; that demand has been made by the proper officers of the new district for the payment of said sum, which has been refused, and the question is whether the same can be recovered in this action.

The respondent's first claim is that the plaintiff's only remedy is under sec. 420, Stats. 1898. This section provides:

"If a new district be formed in whole or in part from one or more districts possessed of a school house or *entitled to other property,* the town board, at the time of forming such new district, shall determine the proportion of the value of

the school house and other property justly due to said new district according to the taxable property of the respective parts of such former district at the time of the division, and such amount of any debt due from the former district which would have been a charge upon the new, had it remained in the former district, shall be deducted from such proportion."

Sec. 421 provides the methods for the collection and payment of the amounts thus found due to the new district by the original district. It will be at once seen that the division of property authorized by this section can only take into account *property* of which the original district is possessed or to which it is entitled *at the time of the forming of the new district.* The new district was doubtless formed on the 28th of August, when the town board took their action, although, owing to the provisions of sec. 419, Id., the order did not go into effect until three months later.

The question whether the tax which was voted at the annual school meeting held July 1st could be considered or taken into account in the division of property authorized by sec. 420 must therefore depend upon the question whether it can be considered as *property* on August 28th. A similar question was before this court in *Herman v. Oconto,* 110 Wis. 660, 86 N. W. 681; and it was there held that taxes which had been levied in a city could not be considered as assets, in determining the net indebtedness of the city, until the tax roll was put in the hands of the collector. It is difficult to see how a thing which cannot be considered as assets can be properly termed property. We think it better to adopt the same rule in the present case as that adopted in the *Herman Case,* and not attempt to draw distinctions where none can reasonably exist. Under the statute the warrant is not required to go into the hands of the town treasurer for collection until the second Monday in December. Sec. 1081, Stats. 1898. Hence, whether the school district be considered as formed on the 28th of August or the 28th of Novem-

ber, this tax which had been voted cannot be considered as property, within the meaning of sec. 420, at the time of the formation of the district. It follows that it could not be divided or considered under the provisions of sec. 420.

Such being the case, the inquiry remains whether there is any statutory provision which authorizes the maintenance of this action. The appellant claims that such a provision is found in sec. 944, Stats. 1898. This section is one of the general provisions relating to municipalities generally, and was evidently passed to provide remedies for cases of territorial division, where for some reason no other specific provision of law exists under which the division of property or the apportionment of indebtedness can be made. This section, among other things, provides:

"The territory detached from any municipality shall receive from the portion thereof remaining its just share of the credits of the municipality and shall be liable to such portion for the excess of such share of the municipal property as is situated within it. Such credits and the value of such property shall be apportioned by ascertaining what ratio the portion detached bears to the territory from which the same has been detached and the last prior equalized assessment shall be the basis of determining the same."

The section further provides that its provisions shall apply to school districts, as well as to counties, towns, cities, and villages. This section seems plainly applicable to the case at bar. The tax which was collected from all the property of the old district and went into its treasury unquestionably became a credit, within the meaning of the section. *School Directors v. School Directors,* 81 Wis. 428, 51 N. W. 871, 52 N. W. 1049. The just share of the new district in such credits would be the amount which its taxable property contributed thereto. The action for money had and received is an appropriate form of action in which to enforce the liability laid down by the section. There being such a remedy by

ordinary action, there is no remedy by *mandamus*. *State ex rel. Worcester v. Nelson,* 105 Wis. 111, 80 N. W. 1105. The demurrer *ore tenus* should have been overruled.

*By the Court.*—Judgment reversed and action remanded for a new trial.

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MAXON, Respondent, vs. GATES, Appellant.

*May 9—May 29, 1903.*

*Appeal and error: Nonappealable orders: Supreme court: Authority to entertain appeals.*

1. An order denying a motion to dismiss an action for want of jurisdiction is not appealable. It does not terminate the action and prevent a judgment from which an appeal can be taken, as is required by subd. 1, sec. 3069, Stats. 1898.
2. The supreme court has no constitutional authority to entertain an *appeal*, not authorized by statute, merely because otherwise the aggrieved party will be without remedy.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Dismissed.*

On December 1, 1902, this action being pending in the circuit court for Milwaukee county on a change of venue from Ashland county, the attorney for the defendant objected to any proceedings being had in the trial thereof upon jurisdictional grounds. The trial court, viewing such objection, apparently, as one to dismiss the action for want of jurisdiction, entered an order in form so stating the object thereof and denying the motion with $10 costs. From the order entered pursuant thereto this appeal was taken.

*Rublee A. Cole,* for the appellant.

For the respondent the cause was submitted on the brief of *Glenway Maxon, in persona.*

MARSHALL, J. The learned counsel suggests that the order should be reversed because it was entered without warrant, no such motion as the one recited therein having been made. It is not perceived how we can consider that question. If it be true that the learned circuit court refused to pass upon the question submitted for decision, which, had he passed upon it favorably to the defendant, would probably have called for an order remanding the cause instead of dismissing it, the appeal here does not reach the error. It seems that such order was intended as a direct and proper response to the objection to the jurisdiction of the court. Such objection, as we understand it, was not made in the form of a motion to remand, nor in the form of a motion to dismiss. It was merely in the form of a demurrer, so to speak, to the jurisdiction of the court. If the order entered is erroneous, the error is not before us for consideration, because it is not appealable within any of the provisions of the appeal statute (sec. 3069, Stats. 1898). It is suggested that it satisfies subd. 1 of such section; but clearly not, because one of the essentials thereof is that the order shall in effect terminate the action and prevent a judgment from which an appeal may be taken. As it is not claimed, and cannot be, reasonably, that the order satisfies any other subdivision of such section, it seems plain that no jurisdiction is conferred upon this court, and that the appeal must be dismissed. Counsel suggests that if such be the case appellant is left entirely without remedy, because the order is not of such nature that it can be reviewed on appeal from the final judgment. If that be so, the fault is with the law. It is not within the constitutional authority of this court to entertain an *appeal* not authorized by statute merely because, otherwise, the party aggrieved will be without remedy. But whether it be true that appellant has no remedy if the right of direct appeal be denied is at least a matter of serious doubt. Further than

that we probably should not speak on the question involved, since we are entirely without jurisdiction in the matter.

*By the Court.*—The appeal is dismissed.

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DUSICK, Plaintiff, vs. GREEN and another, Respondents, MEISELBACH, Appellant.

*May 9—May 29, 1903.*

*Appeal and error: Questions reviewed: Mechanics' liens: Notice of claim for lien by subcontractor: Sufficiency of description of property: Service of notice: Judgment: Correction on appeal: Foreclosure of mechanic's lien: Affirmative relief, when awarded defendant: Practice.*

1. Where there is no clear and overwhelming preponderance of testimony in opposition to findings made by the trial court and its referee, assignment of error upon the making of such findings must be overruled.
2. Sec. 3315, Stats. 1898 (providing for notice to be served by the claimant for a mechanic's lien when such claimant is a subcontractor, material-man, or employee), requires, among other things, that the notice shall declare that the claimant had been "employed" by the contractor; that the *claimant* furnished the materials or performed the labor, and that the balance due is due from the principal contractor. *Held*, that a notice sufficiently satisfies such enumerated calls of the statute, when it declares that the claimant claims to have a lien for a quantity of lumber, etc., furnished for use, and used, in the construction of designated buildings, in pursuance of an agreement with G., the principal contractor, in a specified sum, and that there is still due and owing claimant a certain amount.
3. Sec. 3315, Stats. 1898, prescribes that a subcontractor, material-man or employee in order to acquire the right to file a mechanic's lien, "shall give notice in writing to the owner, or his agent, . . . if to be found in the county, and if neither can be found therein, by filing such notice in the office of the clerk of the circuit court." *Held*, that proof that a notice of claim of a subcontractor's lien was personally served upon the owner showed sufficient service, although it did not appear thereby where the service was made.

4. Under said sec. 3315, the provision for substituted service by filing with the clerk is for the benefit and convenience of the claimant, who may take advantage of it, but need not.
5. The notice required by said sec. 3315 is not in the nature of process, but a document wholly *inter partes*, and effective to give the required information wherever served.
6. Under sec. 3314, Stats. 1898, limiting mechanics' liens in cities to "the parcel of land designed for use in connection with such house . . . not exceeding an acre," a judgment awarding a lien on more than one acre is erroneous, at least to the extent of such excess.
7. A judgment erroneously gave a subcontractor a mechanic's lien on an entire tract of more than the one acre of land used in connection with the buildings erected thereon. The evidence showed without dispute that the building was located on the west one acre of the entire tract. *Held*, that it was proper for the supreme court to correct that error by excluding from the lien the excess over one acre, and to modify the judgment accordingly.
8. Sec. 3320, Stats. 1898, provides, among other things, that the claim for a mechanic's lien filed with the clerk of the court shall contain "a description of the property affected thereby." A claim for a lien described the debtor's premises as a part of a certain quarter section "bounded on the north by lands owned by A. D. M. (the debtor); on the east by the C., M. & St. P. Ry. Co.; on the south by G. street, and on the west by G. street and W. avenue," and declared said premises were less than one acre in extent. The debtor's entire tract was triangular, containing over three acres. *Held*, that the only premises which could meet the attempted description is some portion off the south side, with no designated north boundary, except an unlocated line drawn across the entire tract.
9. In such case, the claim for lien not containing a description of any specific parcel of land, is defective in a vital element, and does not support a judgment awarding a lien.
10. Sec. 2656*a*, Stats. 1898, prohibits granting affirmative relief in favor of one defendant, against another defendant, unless the pleading demanding it is served on the defendant against whom the relief is sought. Secs. 3321–3326, Stats. 1898, regulating foreclosure of mechanics' liens, provides a scheme adapted to an equal sharing among lien claimants, by allowing one to bring the action, to which all others are to be made parties, not only for the purpose primarily of establishing and satisfying plaintiff's own claim, but also for ascertaining the

amounts of all other liens with which plaintiff must share the proceeds of the property. *Held*, that the service of an answer claiming affirmative relief is not necessary from defendant lien claimants, who seek nothing more than a judgment establishing a mechanic's lien, and distributing the proceeds of the property subject to the lien.

11. In such case, a defendant lien claimant, who fails to establish his right to a lien, is not entitled to a personal judgment against the debtor defendant, unless he serves an answer containing demand therefor upon him.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This was a consolidated action for the foreclosure of mechanics' liens, brought originally by the plaintiff, a subcontractor, joining as defendants the appellants, *Meiselbach,* the owner of the property, *A. S. Green,* the principal contractor, and *Wausau Lumber & Coal Company,* another subcontractor, alleging lien rights in the two last and in the plaintiff, and praying that the amounts of the respective liens be ascertained, the property sold, and the proceeds divided amongst the several lienholders. The original principal contract was for the erection of several buildings, fences, and sidewalk upon the premises of the appellant, in North Milwaukee, consisting of a triangular parcel of land, bounded on the north by due east and west line, 442 feet; thence approximately south along a railroad, 484 feet; thence northwesterly along another railroad, 566 feet, to a point due south of the place of beginning; and thence north to the place of beginning, 119 feet—containing 3.03 acres; the whole intended to be used, when completed, as a pleasure park or resort, with dance hall, barns, etc. *The Wausau Lumber & Coal Company* also brought suit as plaintiff, which was consolidated in the action finally tried. The principal contractor, *Green,* in his answer to the complaint, claimed as due a balance of $3,688, also alleged the filing of notice of

lien, and demanded judgment against *Meiselbach* for said balance, and that the said balance be declared a lien. That answer was never served upon, nor any notice thereof given to, the defendant *Meiselbach,* who claims to have been in ignorance thereof up to the commencement of the trial. The court found, upon very conflicting evidence, in favor of the *Wausau Lumber & Coal Company,* that it had furnished lumber for the work to the amount specified in its lien, whereby resulted a balance due it of $1,970. It also found $896.40 due the principal contractor, *Green,* and that he was entitled to a lien therefor. The detailed facts as to certain special objections raised by the appellant will be mentioned in the opinion in connection with their consideration. The court rendered judgment sustaining the liens claimed upon the entire tract of 3.03 acres, and awarded *Green* a personal judgment against appellant for the aforesaid balance found due. *Meiselbach* appeals from so much of this judgment as relates to the claims of *Green* and of the *Wausau Lumber & Coal Company.*

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. H. Remington.*

For the respondents there were briefs by *Kanneberg, McGee & Cochems,* for the respondent *Wausau Lumber & Coal Company,* and by *J. M. Clarke,* for the respondent *Green,* and oral argument by *A. Kanneberg.*

DODGE, J. With reference to the portion of the judgment establishing a lien in favor of the respondent *Wausau Lumber & Coal Company,* appellant's principal attack is upon the findings of fact that the entire amount of lumber specified in its bill was furnished for use, and used, in the erection of appellant's various structures. The evidence on this subject was voluminous and varied in character, consisting of testimony of the claimant's officers and employees who delivered

the lumber, and of *Green* and his assistants, who received and used the same; also of measurements made by different parties of the lumber in the buildings at or about the time of the trial; also of witnesses called by appellant to show possibility of error or mistake as to whether lumber actually sent by the claimant was all used in the building. After a very careful examination of all that evidence, however, we cannot persuade ourselves that there is any clear and overwhelming preponderance in opposition to the findings made by the trial court and its referee thereon, and therefore must overrule the assignment of error upon the making of such findings.

Appellant next assails the notice served by this claimant as not satisfying the requirements of the statute (sec. 3315, Stats. 1898) in three particulars, namely, that it does not declare that the claimant had been "employed" by the contractor; second, that it does not state that *the claimant* furnished the materials; third, that it does not state that the balance due it is due from the principal contractor. After elision of so much as is not material to these objections, the notice, in substance, declares that the claimant claims to have a lien for a quantity of lumber, etc., furnished for use, and used, in the construction of the buildings, in pursuance of an agreement with *A. S. Green,* the principal contrator, in the sum of $4,359.74, of which only $2,389.74 has been paid, and that there is still due and owing to the *Wausau Lumber & Coal Company* the sum of $1,970. While it is true that the notice does not use the exact words of the statute, we cannot, without being too hypercritical, escape the conclusion that for all practical purposes it gives the information required. It does not seem to us that the reader can doubt that the materials so stated to have been furnished were furnished by the claimant, nor that the indebtedness due therefor is due from *A. S. Green,* under an agreement with whom the materials were furnished. We think the notice does declare

an employment, within the meaning of the statute, by stating that the materials furnished are in pursuance of an agreement. The word "employed," in the statute prescribing the subject of the notice, is obviously used broadly to cover the case of a subcontractor and an employee, for either is entitled to lien, and each required to give the same notice.

Another objection is made to the effect that this claimant's notice was not served in the manner prescribed by the statute, for that, while it was served upon the appellant personally, it does not appear where such service was made—whether in the county of Milwaukee or elsewhere. The statute (sec. 3315, Stats. 1898) prescribes that the subcontractor "shall give notice in writing to the owner, or his agent, . . . if to be found in the county, and if neither can be found therein, by filing such notice in the office of the clerk of the circuit court." We do not think the construction of this statute contended for by the appellant reasonable or correct. While it requires only that the notice shall be given to the owner or his agent if found in the county, it does not prohibit a service upon the former elsewhere. The purpose of the statute is so obviously merely that of notification of the requisite facts to the proprietor, that we cannot doubt that personal service of the written notice on him fully satisfies its requirement, and that the provision for substitutionary service by filing with the clerk of court is a permission merely to the lien claimant to dispense with the personal service when that cannot be accomplished within the county, either upon the owner or upon his agent; that it is merely for the benefit and convenience of the lien claimant, who may take advantage of it, but need not. Counsel suggests analogy to the writ or summons, which cannot be effectively served outside of the jurisdiction of the court issuing it, but there is no such analogy. The writ or summons is of the nature of process, and cannot run beyond the territorial limits of the jurisdiction of the court. The notice prescribed by sec. 3315,

Stats. 1898, is not of that nature, but a document wholly *inter partes,* and equally effective to give the required information, whether served in Milwaukee county, Wisconsin, or Lake county, Illinois.

A further assignment of error is predicated upon the fact that the court awarded this and other claimants a lien upon the interest of *Meiselbach* in the entire tract of land used in connection with the buildings and other structures involved, containing 3.03 acres of land. Sec. 3314, Stats. 1898, limits mechanics' liens to "the piece or parcel of land designed for use in connection with such house . . . not exceeding one acre." That all of this tract of land is designed for use in connection with each of the structures erected, there can be no doubt; hence the claimants are limited by this statute to some one particular acre out of this tract. The judgment awarding a lien on more than one acre of land is therefore erroneous, at least to the extent of such excess. A somewhat similar error was dealt with in *McCoy v. Quick,* 30 Wis. 521, 526, where it was held that the error was cured by voluntary remission, permitted to be made after judgment by the trial court. It was there said:

"Had that judgment been brought here by appeal, this court would doubtless have directed the circuit court to ascertain the specific acre to which the lien ought to attach, and then to so modify the judgment as to give the plaintiff his lien on that acre alone. . . . The stipulation and remitter, together, have worked out the proper result."

In accordance with that view, we have no doubt of the propriety of correcting this error in the present judgment by excluding from the lien the excess over one acre. The counsel for the respondent apparently contemplated this difficulty while introducing evidence, and it is proved without dispute that the principal building, which considerably exceeds all the others in cost and value, is located upon the west one acre of the entire tract. Inasmuch as the lien is primarily upon

the building constructed, and only upon the land because used in connection therewith, we are persuaded that no injustice can be done by selecting that west one acre as the realty upon which the lien should be imposed. Indeed, that was suggested upon the argument in this court, and we do not understand counsel upon either side to indicate that it would be other than a wise and proper selection, if selection must and can be made. We have determined, rather than to remit the action for the taking of further evidence upon this subject, to so modify the judgment before us as to limit the lien of the respondent the *Wausau Lumber & Coal Company* to that description. Apart from that error, we find no reason to disturb the portion of the judgment in favor of this respondent.

2. As to that portion of the judgment which awards the principal contractor, *Green,* a lien upon the 3.03 acres of appellant's land, error is assigned, first, because the attempted claim for lien filed in the clerk of court's office did not satisfy the statute, for that it failed to contain "a description of the property affected thereby," as required by sec. 3320, Stats. 1898. That such description is an essential part of the claim for lien without the filing of which sec. 3318, Stats. 1898, provides that no lien shall exist, has often been decided. *Dean v. Wheeler,* 2 Wis. 224; *Brown v. La Crosse City G. L. & C. Co.* 16 Wis. 555; and *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74. *Green's* claim for lien described the premises as a part of a certain quarter section, "bounded on the north by lands owned by *A. D. Meiselbach,* on the east by the Chicago, Milwaukee & St. Paul Railroad, south by Green street, and west by Green street and Western avenue," and declares that said premises are less than one acre in area or extent. As stated in the statement of facts, the entire tract in question is triangular, with a southerly base about 566 feet long; hence the only premises which can meet the attempted description in the claim for lien must

be some portion off the south side of this triangle, with no designated boundary, except a line drawn across the entire tract, which line is wholly unlocated. If claimant had demanded exactly one acre, described by the same boundaries, there would, perhaps, have been no indefiniteness, for then the court might have adopted an east and west line far enough north of the southern boundary to inclose one acre; but claimant has industriously declared that the premises sought to be affected by this notice are not one acre, but merely less than one acre; hence it is impossible to decide from this description whether that east and west line is to be drawn one foot north of the southern boundary, or some eighty or ninety feet north of it. Within such limits, any line will satisfy the calls of this document. We are forced to the conclusion that the notice is defective in a vital element, in that it does not contain a description of any specific parcel of land. Of course, this conclusion is fatal to the maintenance of any lien by the respondent *Green,* and renders erroneous the judgment awarding one.

Another objection raised to the judgment in *Green's* favor is that, by reason of the prohibition contained in sec. 2656*a,* no affirmative relief can be had by one defendant against another unless the pleading demanding same be served on the defendant against whom the relief is sought. That section regulates, and to some extent restrains, the former practice, by which one defendant might obtain affirmative relief against another, the right to which already existed, on general principles of equitable procedure. *Kollock v. Scribner,* 98 Wis. 104, 117, 73 N. W. 776. It undoubtedly abrogated the rule stated in that case, that the pleading demanding that relief need be served only on the plaintiff, unless otherwise ordered. It must be obeyed in any case falling within its purview. There is, however, a special and peculiar practice established for the foreclosure of mechanics' liens, to be fully obeyed, at least so far as is possible without clear

infraction of other statutes. If there be irreconcilable conflict, the dominance of one statute over the other will have to be decided according to the established rules of statutory construction. Secs. 3321 to 3326, Stats. 1898, regulating foreclosure of liens, provide a scheme adapted to an equal sharing among lien claimants. That scheme allows any one or more to bring an action, to which all others are to be made parties for the purpose primarily of establishing and satisfying the plaintiff's own claim, but also of ascertaining the amounts of all other liens with which plaintiff must share the proceeds of the property. All of this is authorized by these statutes as part of and essential to the plaintiff's remedy, and the owner, when served with a complaint alleging existence of liens in favor of other defendants, is at once notified of the necessity of disproving the existence of such as he disputes. The fact that the judgment will award liens to other defendants, and order money paid to them, is only incidental to the granting of full relief to the plaintiff. From this it results that no answer claiming affirmative relief is necessary from defendant lien claimants, who seek nothing more than the judgment establishing a lien, and distributing proceeds of liened property. The answer of defendant *Green* in this case did not stop there, however. It demanded, further, a personal judgment against the owner for the unpaid balance of the building price. The lien statutes nowhere authorize such recovery, except in favor of the plaintiff when he fails to establish his right to a lien (sec. 3324, Stats. 1898), and the rendition of such personal judgment in favor of a defendant lien claimant whose lien fails of establishment is in no wise material or essential to plaintiff's full relief. If, therefore, such defendant may in the lien action demand a mere money recovery, it can be done only by reason of the general policy of courts of equity to settle the rights of parties when once jurisdiction is acquired, or by virtue of sec. 2656*a*. In either event it is a demand for affirmative re-

lief, of which the defendant owner receives no notice by the complaint, and which cannot be granted upon the prayer of an unserved answer without disobedience of the prohibition contained in that section. In this case *Green* failed to establish his right to a lien. He could have the alternative money judgment, if at all, only because demanded affirmatively in his answer, and could not have it in response to that, because he had never served that answer on the appellant. We therefore conclude that no part of the judgment in *Green's* favor can stand, but the judgment must dismiss his claim entirely, for the reasons above stated; hence we need not consider whether the finding of a balance due him is supported by or contrary to the evidence.

*By the Court.*—The judgment is reversed and cause remanded, with directions to the circuit court to modify its judgment in favor of *Wausau Lumber & Coal Company* by limiting the premises upon which its lien is adjudged to the west one acre of the entire tract described in said judgment; also to dismiss the claim and cause of action of defendant *A. S. Green,* with costs against him. Appellant to recover costs of appeal against both respondents.

On September 29, 1903, the judgment was modified so as to provide that only $216.50 as costs be collected out of the *Wausau Lumber & Coal Company.*

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SIEBERT, Respondent, vs. ROTH, imp., Appellant.

*May 11—May 29, 1903.*

***Building contracts: Supervision of architect: Waiver of defects: Mechanic's lien.***

**Where a building contract provides that the contractor shall submit, as to the character of the materials used and work done, to the judgment of a designated architect, and will remove**

**from the premises, on demand of the architect, any materials declared unfit to be used in the building, failure on the part of the architect to promptly reject defective material or construction as the work proceeds constitutes a waiver of such defects.**

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

This is an action by a principal contractor to foreclose a mechanic's lien. The answer alleged defective and incomplete construction of the building, and counterclaimed for damages therefor. The action was referred to a referee, who made findings, which were confirmed by the court. No bill of exceptions has been settled, and the case comes to this court simply upon the findings of the referee.

It appears by the findings that March 11, 1899, the plaintiff, with one Richard Siebert and one Kirsten, entered into a written contract with the defendant *Roth* to do all the carpenter and joiner work on a certain building to be erected by the defendant on her premises, and furnish materials therefor, according to specifications which were made part of the contract, for the sum of $8,400, of which eighty-five per cent. was to be paid upon certificates of the superintendent as the building progressed, and fifteen per cent. thereof after the completion and acceptance of the building, the work and materials to be to the entire satisfaction of F. Graf, architect, who was declared to be the superintendent of the building. The specifications contained the following clause:

"The contractor will be strictly held to execute said work and use such materials as hereinafter described, and will be further held to submit as to the character of the materials used and the work done to the judgment of the architect and superintendent, and will remove from the premises, on the written demand of the architect, any unsuitable materials declared to be unfit to be used on the building. . . . All payments made on the work during its progress are on account of the contract, and shall in no case be considered as an acceptance of the work executed, but the contractor will be liable to all the conditions of the contract until the work is accepted as finished and completed."

It further appears by the findings that the contractors completed their work on November 8, 1899, except that in certain particulars the work and materials did not conform to the specifications, one of which particulars was found by the referee as follows:

"A large quantity of maple flooring is No. 2 maple, instead of being best dressed and matched white maple, as required by the specifications, and was not sandpapered or finished as required; that said flooring as constructed is worth, by reason of the difference in quality of lumber, thirty-three dollars and fifty cents ($33.50) less than if constructed of the quality required; and that it would cost to refinish said flooring, so as to make it in accordance with the requirements of the plans and specifications, the sum of two hundred forty dollars ($240)."

The referee also found, with regard to the laying of the floors, as follows:

"That the plaintiff commenced the laying of the above-named floor in September, 1899, and continued working thereon for about eight weeks; that during said time defendant's architect and superintendent frequently saw the same, and made no written demand for their removal, nor declared any of the materials used unsuitable; that said superintendent did, after much of the floors were down, object to the same verbally, but thereafter allowed said work to be continued without requiring its removal or change."

The referee further found that the balance due on the contract, after deducting all payments, was $198.91, and that there was also due $79.75 for extras, which sums and interest amounted in all to $281.82, and that plaintiffs agreed to take the lumber in a certain shed of the defendant's for the sum of $175, and apply the same on the contract, which sum, with interest, being deducted from the amount due the contractors, left $94.77 still due. The referee also found that the interests of Richard Siebert and Oscar Kirsten had been duly assigned to the plaintiff before the commencement of this action. Upon these facts the referee concluded that all defects

in the performance of the contract had been waived by the failure of the superintendent to reject the defective material and work, and that plaintiff was entitled to a lien of $94.77. Judgment being rendered in accordance with these findings, the defendant *Roth* appeals.

The cause was submitted for the appellant on the brief of *Wheeler & Perry,* and for the respondent on that of *Quarles, Spence & Quarles.*

WINSLOW, J. This case is ruled by the cases of *Laycock v. Moon,* 97 Wis. 59, 72 N. W. 372; *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327, and *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 81 N. W. 136. The doctrine of waiver of defects either in material or construction of a building, by failure on the part of the superintendent to promptly reject the same in the manner provided by the contract as the work proceeds (when such power is reserved in the contract), is so fully stated in these cases that it is unnecessary to more than refer to them.

It is suggested by the appellant that the finding of the court shows that the floors were not sandpapered or finished at all; that there was a total absence of this work; that it could not be ordered or approved by the superintendent; and hence there could be no waiver. Even admitting that such a distinction might be drawn, the difficulty is that the finding is not that the work of sandpapering and finishing was left totally undone, but that it was not sandpapered or finished *as required.* This may well mean that it was not done properly, or in the manner required by the contract. We should feel required to so construe the finding if it were necessary to support the judgment.

*By the Court.*—Judgment affirmed.

FRIEDRICH, Respondent, vs. CITY OF MILWAUKEE, Appellant.

*May 11—May 29, 1903.*

*Municipal corporations: Unlawful grading of streets: Assessment of benefits: Conclusiveness of report of board of public works: Damages: Appeal and error: Harmless error.*

1. The report of the board of public works, in due form, showing by its recitals that the requirements of the city charter in determining both the damages and benefits occasioned by grading down a street were followed, *prima facie* establishes all the facts requisite to sustain the validity of their work, but evidence *aliunde*, showing that the conclusion of the board was not reached by the exercise of judgment, but by a uniform assessment per front foot, is sufficient to overcome such proof, and call for a decision that the assessment is void, in the absence of proof, independent of the report, to the contrary.
2. On appeal from a judgment against defendant, it is harmless error to submit the case to the jury on an incorrect rule of damages, where such rule tended rather to diminish the amount of plaintiff's recovery than to increase it.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to recover for the unlawful grading of a street in front of plaintiff's property to the injury thereof. The facts stated in the complaint were to this effect. The charter of the city of *Milwaukee* permits the original grading of streets only at the cost of the owners of abutting property so far as such property shall be benefited thereby, and only when proper proceedings shall have been taken to charge such property with such benefits. Proceedings were duly had for grading the street in question up to those necessary to determine the amount chargeable to the abutting property for benefits accruing thereto from the work. Such proceedings in that regard as were had are wholly void, since, whereas the board of public works, charged with the duty of making such determination, were required to view the premises and then and

there consider the amount proposed to be made chargeable against such premises and the benefits which in their opinion would actually accrue to the parcel of land from a completion of the work proposed, in the manner contemplated in the estimate thereof filed by the city engineer, taking into consideration in each case any injury which in their opinion might result thereto by such work, and to indorse their decision and assessment on the estimate of the cost of such work filed in their office, they failed to do so. Relying on such void assessment, defendant cut the street down in front of plaintiff's property, to wit, lots 1, 2, 3, 4, 5 and 6, block 4, and lots 1, 2, 3, 4, 5 and 6, block 8, fronting on Hadley street, the street in question, to his damage in the sum of $3,000.

Defendant pleaded, among other things, a charter provision giving the right of appeal to an abutting lot owner in case of his dissatisfaction with an assessment of benefits and damages in the circumstances alleged in the complaint as his only remedy. Defendant also, by appropriate allegations, put in issue all the allegations of the complaint in respect to illegal proceedings by the board of public works.

This court having held that the complaint stated a good cause of action in 114 Wis. 304, 90 N. W. 174, and the evidence produced upon the trial establishing beyond controversy, in the judgment of the trial court, the illegality of the proceedings of the board of public works as charged, the question of damages only was submitted to the jury upon the evidence. A verdict was rendered in favor of plaintiff for $1,380. Judgment was rendered accordingly.

For the appellant there was a brief by *Carl Runge,* city attorney, and *R. S. Witte,* assistant city attorney, and oral argument by *Mr. Witte.*

For the respondent there was a brief by *Jared Thompson,* attorney, and *C. H. Hamilton* and *Howard Van Wyck,* of counsel, and oral argument by *Mr. Hamilton* and *Mr. Van Wyck.*

MARSHALL, J. The point is made that the report of the board of public works offered in evidence showed, by the recitals therein, that the requirements of the charter were followed as to determining both the damages and the benefits to plaintiff's property by the grading of the street, and an assessment only of the excess of benefits over damages against such property; and that there was no evidence to the contrary, hence, within the rule of *Hennessy v. Douglas Co.* 99 Wis. 129, 74 N. W. 983, respondent failed to prove the cause of action alleged. Such rule goes no further than that the report of the assessment board, made in due form, *prima facie* establishes all the facts requisite to sustain the validity of their work, but that evidence *aliunde,* showing that the conclusion of the board could not reasonably have been arrived at by the exercise of judgment, is sufficient to overcome such proof and call for a decision that the assessment is void in the absence of proof, independent of the report, to the contrary.

Giving full effect to that rule, as we must, it does not help appellant, because we are unable to agree that there was no evidence produced upon the trial to impeach the report of the board. The evidence shows, without dispute, that the cut in front of respondent's property varied from eight to twenty-six feet. That physical situation, of itself, shows that the assessment of benefits at a uniform rate of $10 per front foot must have been made regardless of the charter provision that the effect of the grading as to each lot or parcel of land must be considered and determined as a separate matter. In other words, that the uniform assessment per front foot was wholly arbitrary and without authority of law. It was so held in *Kersten v. Milwaukee,* 106 Wis. 200, 81 N. W. 948, 1103. Again, there was indisputable evidence produced upon the trial, independent of the physical situation itself, that all the lots were seriously damaged by the grading. There was evi-

dence strongly tending to show that some of them were thereby rendered valueless. Under those circumstances the court did right in submitting to the jury only the question of damages.

There was a house on one of the lots, which, the evidence shows, would have been left by the grading in a dangerous situation had it not been removed. Complaint is made because the court permitted evidence of the cost in that regard, and of building a retaining wall, and some other matters to secure the house in its new location. That complaint is based on two grounds: First, because there was no evidence of necessity for the removal of the house; and second, because it introduced into the case an erroneous rule of damages. We are unable to see any merit in the first proposition, since we find ample evidence in the record tending to show that the cutting down of the street in front of the house gave respondent good reason to believe, as the fact was, that the house, if not removed, might be damaged and the injury be chargeable to his own negligence in not exercising proper care to prevent the cutting down of the street, causing him unnecessary loss. On the second proposition we are unable to discover that appellant was prejudiced, though the correct rule of damages was, perhaps, to some extent invaded. True, the general damage to respondent was the difference between the value of the property before the street was cut down, and the value thereafter, and in determining the same in the regular way damages to the house would be deemed to be included in the damages to the lot. However, it satisfactorily appears that the removal of the structure, charging appellant the items of expense which the court submitted to the jury as legitimate elements of damage, tended rather to diminish the amount of respondent's recovery than to increase it. The claim that the evidence as to the injury to the lots did not disassociate the diminished value of the land from that of the house, from

our examination of the evidence appears to be unfounded. It does not seem necessary to go into an analysis of the evidence here to support that conclusion.

Some complaints are made of the judge's charge, based, however, on errors which we have already discussed unfavorably to appellant. The errors assigned as to the charge must fall with the others.

*By the Court.*—The judgment is affirmed.

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CHARLEY, Respondent, vs. POTTHOFF and another, Appellants.

*May 11—May 29, 1903.*

*Contracts: Theatrical performances: Breach: Evidence: Court and jury: Direction of verdict: Election of remedies: Rescission: Waiver: Guaranty: Principal and surety: Material alterations of contract:* Res gestæ.

1. In an action by the manager of an opera company to recover the balance of compensation agreed to be paid by defendant for three performances by the company, wherein defendant set up the defense that the performances failed to comply with the contract, the evidence (stated in the opinion) examined, and *held* to raise an issue of fact wherein reasonable minds might differ, and it was therefore error to direct a verdict for plaintiff.
2. One party to a contract may accept and pay for that which is delivered to him as in performance of the contract, without in any wise impairing his right to redress, if performance is not in compliance with the contract.
3. In such case, the injured party may elect to rescind, return what is received, if that be possible, and recover back the contract price paid, and defend against claim for any not paid; or he may retain what is furnished and sue for the damages occasioned to him by any defects, either in an original action, or by setoff, or counterclaim against a suit for the contract price. This is specially true where the recipient of the performance or contracted article is so situated that he cannot forego its use without serious disturbance or injury.

4. Plaintiff contracted with defendant P. to furnish the full acting company of "Charleys' Grand French Opera Company," consisting of thirteen enumerated actors, and an orchestra of thirty-two musicians "who accompany the said production." Relying thereon P. rented a theater, and collected considerable sums subscribed for advance sales of sittings, which P. spent in advertising. Two of the actors and twelve of the orchestra were not furnished; the operas were rendered in a manner unpleasant and unsatisfactory to the general public, and thereby the box-office receipts were greatly diminished. P. paid part of the contract price, and the last night turned over to plaintiff the entire box-office receipts to apply on the contract price. Action being brought for the unpaid contract price, P. alleged such defective performances as a defense, and counterclaimed for damages on the same grounds. *Held*, that it was error to take the case from the jury on the ground that, by making partial payments, P. waived any breach and thereby accepted the contract commodity.
5. Where a theatrical performance was not of the standard required by the contract, it is not necessary for the person contracting for such performance to make complaint after the same had been given and received by him in ignorance of defects, nor would payment of money upon, or even in full of, the agreed consideration for the performance, debar him from recovering or setting off the damages suffered by him by reason of the defects.
6. The rule that one who accepts goods known to be tendered as satisfying a contract will be deemed to have waived defects known to him, or which would be apparent to one exercising ordinary care, unless he objects within a reasonable time, has no application to the acceptance of a performance by a theatrical company where, at the time of the acts on which the acceptance is predicated, the performance had been given, and the contractee had on his hands a theater already specially rented, a specially invited audience, and the proceeds of advance sales of tickets invested in advertising.
7. In an action against a manager of a theater and a surety to recover the unpaid price of a theatrical performance, a verdict was directed for the plaintiff. It appeared, among other things, that all parties contemplated that the box-office receipts were the primary fund from which payment was to be made. *Held*, that while the manager might accept a performance inferior to that required by the contract, and thereby make himself liable to pay the contract price, such action would not justify a judgment against the surety.

8. In an action to recover the contract price for a theatrical performance, the defense was non-compliance with the provisions of the contract as to the merits of the performance. *Held*, that declarations of patrons, at the very moment of leaving the theater, of their reasons for so doing, are admissible as *res gestæ*.

APPEALS from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Plaintiff, being the manager of a French opera company, on March, 1900, entered into a written agreement with the defendant *Potthoff* to give three performances at the Pabst Theater, Milwaukee, to furnish "the full acting company of Charley's Grand French Opera Co. from New Orleans. The said company composed, among others, of the following named artists, to wit [naming thirteen persons], etc., capable of producing the following named operas: Les Huguenots, Romeo and Juliette, La Juive, and other operas also. His corps of ballet with three principal dances, and the requisite costumes, scenery, etc., required in the production of said operas; also an orchestra of thirty-two (32) musicians, who accompany the said production." *Potthoff* agreed to pay therefor $5,000, viz., $1,000 at the conclusion of the first performance, $2,000 at the conclusion of the second performance, and the balance of $2,000 at the conclusion of the second act of the third performance. The appellant *Coates* executed a guaranty or bond, in which he guaranteed unto the plaintiff "the full and faithful performance of said contract by said *Potthoff* promptly according to the terms and conditions thereof." The company was produced at the dates named, and gave three performances, which are claimed by the defendants to have failed of compliance with the contract, in that they were defective, not characterized by reasonable or proper skill or artistic merit, and that they did not include certain artists, nor the full acting or orchestral force of the company, from which resulted public dissatisfaction, loss of

box-office receipts, etc., to the damage of the defendant *Potthoff,* who, however, paid the $1,000 at the close of the first performance, a second $1,000 at the close of the second performance, and at the close of the second act of the third performance allowed the whole proceeds of the box-office, after deducting other expenses, to be paid over, amounting to about $800. The action is brought to recover the balance of the $5,000, or $2,187.50. Defendant *Potthoff* alleges the defective performance as defense, and also counterclaims on the same grounds for $2,000 damages. At the close of the evidence, without passing upon the alleged breaches of contract on the part of the plaintiff, the court directed a verdict upon the ground that the defendant *Potthoff,* by making the payments aforesaid, had accepted the performance as satisfying the contract, and had waived any defects therein. Judgment being entered upon such verdict, the defendants appeal separately.

For the appellants there was a brief by *Charles Friend* and oral argument by *Arthur S. Friend* and *M. M. Riley.*

For the respondent there was a brief by *Turner, Pease & Turner,* and oral argument by *L. S. Pease.*

Dodge, J. The respondent seeks to justify the action of the trial court in directing a verdict by the contention that there was no evidence that the performances supplied by plaintiff were not in full accord with the contract. He asserts that testimony of persons attending such performances is no evidence of the insufficiency of the service, for the reason that such witnesses had no standard of comparison; the only proper standard, according to his contention, being that of the performances ordinarily given by this particular company. We shall not devote time to a consideration of this last proposition. Suffice it to say that an examination of the record discloses evidence of insufficient and defective performance as measured by any conceivable standard—whether that of opera

companies generally, of French opera companies, of traveling opera companies, of the French opera companies usually managed by this same plaintiff, and that of this particular company as it gave its performances at other places. Besides which there is evidence of failure in the respects specifically required by the written contract, notably in the nonappearance of two of the special artists contracted for, and in the furnishing of a less number of trained musicians in the orchestra. There is also abundant evidence that by reason of these omissions, especially that of the orchestra, the performance was rendered unpleasant and unsatisfactory to the general public, with the resulting effect of diminished attendance and box-office receipts. True, there is evidence in conflict therewith, and evidence tending to excuse some of these specific omissions, but the only result thereof was to raise an issue, where, to say the best for the plaintiff, reasonable minds might differ, and which, therefore, was properly for the jury.

Respondent next contends that the action of the court was justified by an agreement made during the last of the three performances, before the completion thereof, which he asserts was a promise by defendant *Potthoff* to pay at some future time the unsatisfied balance of the $5,000 of contract price. The court did not put its action on the ground of such a promise, and upon examination we find no sufficient evidence thereof; the burden to prove such agreement or promise being clearly upon the plaintiff. The testimony of the attorney who drew the paper claimed to contain this promise is quite as consistent with its being merely a recognition that the amount then paid was not intended in full satisfaction, but merely as a payment upon account of the entire contract price. The only other evidence on the subject is that of the defendant *Potthoff,* who says he cannot remember what such document did contain. Certainly such proof was not sufficient to conclusively lift the burden, and take the question of the making of any such promise away from the jury. The

ground upon which, apparently, the trial court did assume to withdraw the case from the jury was "that the defendants waived any breach of the contract by paying under the contract, taking receipts pursuant to the contract for money paid in pursuance of the contract; the whole testimony shows undisputably that the defendants accepted the company and the performance as represented." Probably no rule of law is more fully settled than that one may accept and pay for that which is delivered to him as in performance of a contract without in any wise impairing his right to redress if the performance is not in compliance with the contract. In such case his remedy is usually alternative. He may elect to rescind, return what is received, if that be possible, and recover back any of the contract price paid, and defend against claim for any not paid; or he may retain what is furnished and sue for the damages occasioned him by any defects, either in an original action or by setoff or counterclaim against a suit for the contract price. *Ketchum v. Wells,* 19 Wis. 25; *Schweickhart v. Stuewe,* 71 Wis. 7, 36 N. W. 605; *Park v. Richardson & B. Co.* 81 Wis. 399, 403, 51 N. W. 572; *Larson v. Aultman & T. Co.* 86 Wis. 281, 290, 56 N. W. 915; *Parry Mfg. Co. v. Tobin,* 106 Wis. 286, 82 N. W. 154; *Waupaca E. L. & R. Co. v. Milwaukee E. R. & L. Co.* 112 Wis. 469, 473, 88 N. W. 308. This rule is of special application where the recipient of the performance or contracted article is so situated that he cannot forego its use without serious disturbance and injury; as in the *Ketchum Case,* involving stave bolts, which the purchaser must keep and use or interrupt the whole business of his mill. The case in hand probably presents no opportunity for *Potthoff* to have rescinded under his alternative right above stated. A song that is sung cannot well be delivered back, to the re-establishment of the *status quo* of either singer or audience. There is, however, no such obstacle to the exercise of the other of defendant's elective rights, namely, to recover or set off the damages suffered by him by

reason of defects in the article supplied under this contract. To that end it was not necessary for him to make complaints after the goods had been delivered to and received by him in ignorance of such defects; nor would payment of money upon, or even in full of, the purchase price debar him, especially if paid under threats of conduct which might cause him great injury, as evidence tended to prove. We are not unmindful of the rule that one who accepts goods known to be tendered as satisfying a contract or warranty will be deemed to have waived defects therein which are then known to him, or of which he could not escape knowledge save by failing to observe that which would be apparent to one exercising ordinary care, unless he objects then or within a reasonable time. *Locke v. Williamson,* 40 Wis. 377; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 92 N. W. 246; *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785. That rule can have no application to the situation here, however, for at the time of the acts on which the court predicated waiver and acceptance the contract commodity had already been delivered to *Potthoff,* and was on his hands, and he was in the predicament of having a rented theater also on his hands and an audience invited, some of whom had already paid their money, which he had spent in advertising. He must use that company or shut up the theater and pay back the subscription money. For another reason, also, this last rule could not justify the court's conclusion, namely, because the proof is by no means conclusive that *Potthoff* knew, or by ordinarily careful observation should have known, of the defects and deficiencies in the company and performance tendered him at the time of its acceptance, or even at the time of making payments. Even if he was aware that the performance was not as pleasurable as expected, he may well have been ignorant of the reasons. The insufficiency of the orchestration may or may not have been noticeable by him; but, even if it were, he may not have known that instead of thirty-two regular trained accompanists

there were but twenty-four; or, even if he knew that, he might still be ignorant that the musicians picked up in Milwaukee had never been given the opportunity of a rehearsal. In several other respects, also, the evidence lacks conclusiveness as to his knowledge or means of knowledge of the specific breaches of the plaintiff's contract. We need not extend this opinion to discuss them in detail, for we have said enough already to make obvious that the court erred in taking the case from the jury, whether on the ground of waiver and acceptance, as stated by him, or on any of the other grounds now urged by the respondent.

Even if *Potthoff* might have become liable by acceptance of an inferior company and performance and waiver of some part of plaintiff's contract duty, that could not justify verdict or judgment against the surety, *Coates;* certainly if the failure of performance were in any degree material to his liability. The surety is entitled to stand upon the strict terms of his contract, and cannot be held liable otherwise. *W. W. Kimball Co. v. Baker,* 62 Wis. 526, 22 N. W. 730; *Stephens v. Elver,* 101 Wis. 392, 77 N. W. 737. *Coates* bound himself to guaranty payment by *Potthoff* only on condition that the plaintiff performed his part of the agreement. It is apparent that all parties contemplated that the box-office receipts were the primary fund from which payment would be made. Anything which might tend to diminish those receipts impaired *Potthoff's* ability to meet his engagements, and enhanced the liability of the surety. That a poor performance would probably deter attendance is too plain for debate. Therefore defects such as the evidence tended to prove were material to the surety. *Potthoff* might for himself consent to accept an insufficient or an untrained orchestra different from that specified in the contract, either expressly or by acts of waiver; but he could not thereby impose on *Coates* a liability to which the latter had not bound himself. Hence, even in the view which the trial court took of the evidence and of the legal

effects of *Potthoff's* conduct in failing to object and in making payments, the direction of verdict against appellant *Coates* was erroneous.

One rejected offer of evidence must be noticed because of its probable materiality upon another trial. It having appeared that large numbers of the audience left the theater during one of the performances, a witness was asked what he heard any of them say as to their reason for doing so. If the fact of such departure was material—as it doubtless was—the reason was much more so. It would not seriously reflect on the quality of the performance if people left because of a gathering storm, or because the theater was too cold for comfort. It might have that effect if done because the conduct of the performers was unseemly, or their acting or singing bad. We can conceive of no clearer case of admissibility of statements as *res gestæ,* characterizing the act done, than declarations of people, in the very moment of leaving a theater, of their reasons for so doing. The evidence should have been admitted. *Mack v. State,* 48 Wis. 271, 4 N. W. 449; *Bliss v. State,* 117 Wis. 596, 94 N. W. 325.

For the reasons stated, the judgment must be reversed upon the appeal of each of the defendants, who, however, will be entitled to but a single bill of costs, they both having appeared by the same counsel and joined in the same case and brief.

*By the Court.*—Judgment reversed, and cause remanded for a new trial.

SAVELAND, Respondent, vs. WESTERN WISCONSIN RAILROAD COMPANY, Appellant.

*May 12—May 29, 1903.*

*Contracts: Sales: Appeal: Material error: Instructions to jury: Corporations: Contracts of officers: Apparent authority: Statute of frauds: Parol evidence: Measure of damages.*

1. In an action against a corporation on a contract for the purchase of brick, executed by its treasurer, there was no evidence that the treasurer was vested with authority to make contracts like the one in question. There was conflicting evidence on the question of his apparent authority. *Held*, that it was material error to refuse to instruct the jury as to how such apparent authority could be given the treasurer in the situation disclosed by the evidence.
2. A written order was signed by a buyer, calling for 400,000 kiln-run brick. The order provided, in case the sample brick proved unsatisfactory, that hard-burned sewer brick should be furnished by the seller at fifty cents extra per thousand. *Held*, that under sec. 2308, Stats. 1898 (providing that all contracts for the sale of chattels, for the price of fifty dollars or more, shall be void unless in writing, etc.), parol testimony that the order was modified, so as to provide that hard-burned sewer brick should be furnished, was inadmissible.
3. In such case, it appeared that the basis of damages was an executory contract of sale of brick, a commodity of purchase and sale in open market. *Held*, that it was error to instruct the jury, that when it appears that the purchaser knew that the vendor had an existing contract for the purchase of merchandise, and that the vendor is making a resale to him at an advanced price, the profits on such resale are the damages contemplated by the parties in case of the breach of the contract of purchase.
4. In such case, the measure of damages is the difference between the market value of the property at the time of the breach and the contract price at the place of delivery.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

This is an appeal from a judgment in favor of plaintiff. The action was brought to recover damages for breach of agreement, by the terms of which it is alleged plaintiff sold

and agreed to deliver to defendant *400,000 hard-burned sewer brick at $10.25 per M.*, to be delivered at La Farge, Wisconsin; delivery to commence within sixty days after date of agreement, and continue as brick were needed by defendant. Plaintiff alleges his readiness and offer to perform by delivery of the brick as agreed, but that defendant refused to receive and pay for the same, to his damage, which he seeks to recover. It appeared upon the trial that C. W. Norris, as treasurer of the defendant company, placed with the plaintiff the following order:

"Gentlemen: Please place our order for *400,000 kiln-run brick like sample at $9.75* (nine dollars and seventy-five cents) per thousand, delivered in La Farge, Wis. Delivery to commence within sixty days and continue as brick are wanted. If kiln-run prove unsatisfactory after car-load sample you are to furnish hard-burned sewer brick at fifty cents extra per M. I reserve right until Thursday the 14th inst. to rescind this order.

"Respectfully,
"C. W. NORRIS, Treasurer."

On December 14th this plaintiff and said Norris and H. A. J. Upham, the president of defendant company, met at defendant's office, and orally agreed to change the order to hard-burned sewer brick of the kind and quality represented in sample exhibited by plaintiff to said Norris. Some further negotiations were had at this time between plaintiff and defendant's officers regarding plaintiff's ability to furnish the brick last agreed upon, which resulted in an arrangement that plaintiff should procure from the dealer who was to supply him with the brick a written contract between such dealer and the defendant company, whereby the dealer was to become obligated to the defendant to furnish the quantity and kind of brick specified. The parties disagree as to the purpose and intent of the agreement with the dealer. Plaintiff asserts that it was merely to serve as an assurance that he could deliver the brick to defendant under the agreement as

made on the 14th of December, while defendant claims this arrangement canceled and revoked all previous arrangements, including the order of December 11th, and the agreement of December 14th, whereby this order was changed *from* kiln-run brick at $9.75 *to* hard-burned sewer brick at $10.25 per M. It further appeared that plaintiff received from defendant a memorandum agreement, dated as of December 18, 1899, embodying a contract between the May, Purrington & Bonner Brick Company of Chicago and defendant for a sale of *400,000 hard-burned sewer brick at $10.25 per M.*, to be delivered at La Farge, Wisconsin; that this contract was executed by defendant company, by H. A. J. Upham as president, and that plaintiff sought to procure the May, Purrington & Bonner Brick Company to enter into this agreement, but they refused to become a party thereto. Without further negotiations with defendant, plaintiff substituted Hayt & Alsip as parties to this proposed agreement, who subscribed it. Plaintiff thereafter offered the agreement as signed by Hayt & Alsip to defendant, who refused to receive it, and thereupon declared the whole transaction revoked and annulled. The issues were submitted to a jury upon a special verdict. Its findings upon the material issues involved on this appeal were that defendant sanctioned the making and delivery of the order of December 11, 1899, by C. W. Norris, as its treasurer; that plaintiff accepted the order of December 11th; that plaintiff and defendant agreed on or before December 14th that *hard-burned sewer brick should be furnished under the order of December 11th instead of kiln-run brick, as contemplated in said order;* that the order of December 11th was not revoked by the company on or before December 14th; that plaintiff and defendant did not agree on the memorandum dated December 18th, between defendant and the May, Purrington & Bonner Brick Company; that defendant did not authorize a change in the memorandum agreement of December 18th; that defendant approved the change of par-

ties made by plaintiff to this agreement of December 18th by inserting Hayt & Alsip as parties thereto; and that the memorandum agreement of December 18th was not agreed to be substituted for any other agreement as to the sale of the brick.

For the appellant there was a brief by *E. L. Richardson* and *F. A. Geiger,* and oral argument by *Mr. Geiger.*

The cause was submitted for the respondent on the brief of *Doerfler, McElroy & Eschweiler.*

SIEBECKER, J. The court submitted to the jury the question of the authority of C. W. Norris, as treasurer of the company, to make the contract in question, without instructing them in the law as to how such authority could be given him in cases of this kind. Defendant's counsel requested the court to instruct the jury that the treasurer of a corporation, unless given power by the articles of incorporation, by-laws, or other express direction of the corporation, has no authority to act as purchasing or contracting agent, and, further, to instruct them as to what constitutes apparent authority for the treasurer to act as such agent. There is no evidence in the case showing that Norris, as treasurer, was vested with authority to make contracts like the one in question, by defendant's articles of incorporation, by-laws, or other express direction. The question whether he had apparent authority to make contracts of this nature was to be determined by the jury upon the conflicting evidence material to this branch of the case. No instruction was given them on this subject, though defendant's counsel submitted and requested an instruction embodying the rule applicable to the facts and circumstances of the case. The rules of law in the light of which the jury were called upon to resolve this disputed question of fact should have been given them, to remove the uncertainties and speculations we now encounter in trying to ascertain what rules of law the jurors acted on in deciding this disputed question. The omission to so instruct the jury may have

caused them to apply some rule not recognized in the law, or adopt some theory wholly foreign to the issue involved. We are of opinion that such refusal to instruct upon this subject was prejudicial to defendant's rights, and constitutes reversible error in the case.

The record raises the inquiry as to the right of the plaintiff to maintain this action, in view of the uncontradicted fact that the contract sued on is not the written order of December 11th. The jury found that plaintiff and defendant on or before December 11th agreed that *hard-burned sewer brick, at $10.25 per M.,* should be furnished *under the order of December 11th,* instead of *kiln-run brick at $9.75 per M.,* as contemplated in said order. The court received plaintiff's parol testimony of negotiations concerning this change in the order of December 11th to sustain his cause of action for the sale of *hard-burned sewer brick at $10.25 per M.* Is the contract upon which plaintiff relies as a sale of the brick valid in the law, under sec. 2308, Stats. 1898, requiring such a contract of sale to be in writing? Does this order show upon its face, and without resorting to extraneous evidence, that defendant purchased a quantity of hard-burned sewer brick at $10.25 per M.? Certainly no such inference could properly be drawn by the court. But no claim is made that such a conclusion could be reached in the absence of oral testimony in connection with the order. Plaintiff did not rely upon the order alone, but offered parol evidence tending to show that the sale was consummated at an interview on or before December 14th, the day when the right to rescind the order by defendant expired. But the paper is wholly silent as to any agreement by the parties that the sale was of hard-burned sewer brick at $10.25 per M., instead of kiln-run brick at $9.75 per M., as specified on the face of the order. To establish plaintiff's cause of action required the introduction of parol proof to show the actual bargain and sale, in addition to the written memorandum. These facts present a case

where parol testimony was, of necessity, resorted to, to show a modification of the written agreement, which is contrary to the statute to prevent frauds. The rule is well stated by Chancellor Kent (2 Comm. 511): "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent." *Atlee v. Bartholomew,* 69 Wis. 51, 33 N. W. 110; *Wiener v. Whipple,* 53 Wis. 298, 10 N. W. 433; *Meincke v. Falk,* 55 Wis. 427, 13 N. W. 545; *Hanson v. Gunderson,* 95 Wis. 613, 70 N. W. 827; *Blood v. Goodrich,* 9 Wend. 68; *Grafton v. Cummings,* 99 U. S. 100; *Salmon Falls Mfg. Co. v. Goddard,* 14 How. 446; *American Oak L. Co. v. Porter,* 94 Iowa, 117, 62 N. W. 658; Beach, Mod. Cont. § 581; Benjamin, Sales, § 221.

An important ground of error assigned pertains to the rule of damages in the case. The court instructed the jury as follows:

"When it appears that the purchaser knew that the vendor had an existing contract for the purchase of merchandise, and the vendor is making a resale to him at an advance price, the profits on such resale are the damages contemplated by the parties in case of the breach of the contract of purchase."

The basis of damages in the action is the breach of the executory contract of sale. It sufficiently appears by the evidence that brick—the article of sale covered in plaintiff's cause of action—is a commodity of purchase and sale in the open market. The case comes within the established rule of damages where a vendee breaches the contract by refusal to accept the article sold. The measure of damages in such cases is the difference between the market value of the property at the time of the breach and the contract price at the

place of delivery. *T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513; *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368; *Gehl v. Milwaukee P. Co.* 116 Wis. 263, 93 N. W. 26.

For these reasons, the judgment must be reversed.

*By the Court.*—Judgment reversed, and cause remanded for a new trial.

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AMERICAN BICYCLE COMPANY, Respondent, vs. HOYT, Executrix, Appellant.

*May 12—May 29, 1903.*

*Landlord and tenant: Lease: Construction: Liability of lessee for rent.*

A lease provided that in case *any* buildings on the demised premises shall, without fault of the lessee, be destroyed "the lessee shall not be liable or bound to pay the rent to the lessor *until the same are rebuilt or repaired*, or he may thereupon quit and surrender possession of the premises." One of the buildings, without any fault or negligence of the lessee, burned, and to that extent the demised premises became untenantable and unfit for occupancy. The lessee did not quit or surrender possession. *Held*, that the lessee was not bound to pay any rent until the lessor rebuilt the destroyed building.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was commenced December 29, 1900, to recover $250 rent alleged to be due the plaintiff upon a lease executed by the plaintiff and the defendant's intestate, Thomas H. Hoyt, December 29, 1899, wherein and whereby the plaintiff leased to Thomas H. Hoyt the premises therein described for the term of two years from January 1, 1900, at the annual rent of $750 per year, to be paid in equal portions on the 1st day of each and every month, commencing on the day and

year last named; and which lease contained a provision that the lessee should keep the premises "in as good repair as the same are in at the commencement of said term, reasonable use and wearing thereof, and damage by accidental fire, or other accidents not happening through the neglect of the lessee, his agents or servants, *only excepted;* but in case any building or buildings on said premises shall, without any default or neglect of the lessee, be destroyed, or be so injured by fire, or any other cause, as to be untenantable and unfit for occupancy, the lessee shall not be liable or bound to pay rent to the lessor until the same are rebuilt or repaired, or he may thereupon quit and surrender possession of the premises." The answer admits the incorporation of the plaintiff, the making and terms of the lease, and that the lessee had paid no rent since August 1, 1900, but otherwise denies the allegations of the complaint, and as a defense sets forth the clause of the lease in respect to fire above quoted, and alleges, in effect, that one of the main buildings and one of the largest of the buildings upon the premises was, August 14, 1900, without any fault or neglect of the lessee, destroyed by fire, and by reason of such destruction the premises became, and ever since have been, untenantable and unfit for occupancy; that soon after such destruction the lessee duly demanded of the plaintiff that it repair the same, and place the same in a tenantable condition and fit for him to occupy, but that the plaintiff had refused to do so, and still refuses to do so; that the lessee has not elected to quit or surrender possession of said premises, but is still in possession thereof; that by reason of the express reservations contained in the lease the lessee became discharged from the payment of any rent September 1, 1900, and has ever since that time remained discharged and is now discharged from the payment of rent until the plaintiff rebuilds the buildings so destroyed. At the close of the trial the court found, in effect, the making and terms of the lease, the occupancy of the premises by the lessee,

and the failure to pay rent as mentioned; that one of the buildings upon the premises was destroyed by fire August 14, 1900; that the lessee retained possession of the premises, and the whole thereof, after the fire, and continued to occupy the same, and was in possession of the same at the date of the trial. And as conclusions of law the court found that the lessee did not surrender the premises in question to the plaintiff at any time; that there was then due and owing to the plaintiff from the defendant on account of the lease $250, with interest on the several installments of rent from the times they respectively became due; and ordered judgment to be entered accordingly. From the judgment so entered the defendant, *Marion L. Hoyt,* as executrix of the deceased lessee, brings this appeal.

For the appellant there was a brief by *A. D. Agnew* and *Geo. L. Williams,* and oral argument by *Mr. Williams.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *J. V. Quarles.*

CASSODAY, C. J. The decision in this case necessarily turns upon the construction to be given to the clause of the lease quoted in the foregoing statement. The court found that one of the buildings upon the leased premises was destroyed by fire. It is, in effect, conceded that such destruction by fire was "without any default or neglect of the lessee," and that to that extent the premises became "untenantable and unfit for occupancy." The clause of the lease in question was applicable "in case *any* building" on the leased premises should be so destroyed. As applied to the facts in the case, it provides, in effect, that, "in case any building or buildings on said premises" shall be so destroyed, "the lessee shall not be liable or bound to pay rent to the lessor *until the same are rebuilt or repaired,* or he may thereupon quit and surrender possession of the premises." It is found by the court and conceded that the lessee did not, after the fire, quit or

surrender possession of the premises. It is claimed on the part of the plaintiff, and the court, in effect, held, that the lessee could only relieve himself from the payment of rent by quitting and surrendering possession of the premises immediately after the fire. In support of such ruling counsel for the plaintiff cite certain cases arising under statutes in New York, Ohio, and Minnesota. The New York statute relieved the tenant from the payment of rent after the destruction of the building by the elements, unless otherwise agreed, and gave him the remedy of quitting and surrendering the possession of the premises, but did not, as the lease here provides, expressly stipulate for a suspension of the payment of any rent until the destroyed building should be rebuilt or repaired by the lessor. "It is well settled that in construing a contract all of its terms must be considered." *Mayer v. Goldberg,* 116 Wis. 96, 92 N. W. 556, 558. There is nothing ambiguous in that clause of the lease, and there is no reason why force and effect should not be given to it. Id. The clause of the lease differs so broadly from the provisions of the New York statute as to make the adjudications in that state under that statute inapplicable. They held, in effect, that it was optional with the tenant to surrender possession and terminate the lease in case of such destruction, but that, if he failed to do so, he was liable for rent. *Johnson v. Oppenheim,* 55 N. Y. 280; *Smith v. Kerr,* 108 N. Y. 31, 15 N. E. 70; *Fleischman v. Toplitz,* 134 N. Y. 349, 31 N. E. 1089. Under a statute of Ohio substantially the same as the statute of New York a similar ruling was made. *Gay v. Davey,* 47 Ohio St. 396, 25 N. E. 425. The same is true in respect to the statute of Minnesota and the adjudications under it. *Roach v. Peterson,* 47 Minn. 291, 50 N. W. 80. The difference between the clause of the lease in question and the statutes referred to is well illustrated in the case of *Kip v. Merwin,* 52 N. Y. 542, 544, where the lease contained "a condition that, in case the demised premises are so damaged by

fire as to be untenantable, the rent shall cease until the same shall be put in good repair," and it was held that "the terms of the lease did not require that the tenants should abandon their possession to entitle them to a suspension of the rent." As indicated, we have no right to ignore the express stipulation of the parties in the case at bar. The intention, as gathered from the language they have employed, must be carried into effect. *Mayer v. Goldberg, supra.* The lease expressly provides that upon such destruction of the building or buildings the lessee should "not be liable or bound to pay rent to the lessor *until the same are rebuilt or repaired,* or he may thereupon quit and surrender possession of the premises." This not only gave the lessee the right to quit and surrender possession of the premises, but also relieved him from paying rent to the lessor until the building so destroyed should be rebuilt or repaired. True, there is no agreement on the part of the lessor to rebuild or repair, but there is an agreement that the lessee shall not be bound to pay him rent until he does so. If the lessor fails to rebuild or repair, the loss falls on itself. We have no right to construe away the provisions of the agreement which the parties made for themselves.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the complaint.

# HOFFMAN, Respondent, vs. VILLAGE OF NORTH MILWAUKEE, Appellant.

*May 12—May 29, 1903.*

*Municipal corporations: Personal injuries: Defective sidewalks: Contributory negligence: Notice of injury: Sufficiency: Evidence: Excessive damages.*

1. Plaintiff was injured by falling on a defective sidewalk. She testified that she was walking carefully, and saw nothing wrong until a board tipped sideways as she stepped on it, which caught her foot, throwing her to the ground and seriously injuring her. Other testimony established that one board was entirely missing and two or three boards loose, but lying in their places. Plaintiff, who prior to the accident had frequently passed over the sidewalk at the point in question, had not noticed such defects. *Held*, that the question whether plaintiff was guilty of contributory negligence in not noticing the condition of the walk and taking greater precautions, was properly for the jury.
2. Sec. 1339, Stats. 1898, provides that notice of claim for injury on a highway shall be given stating the place where such injury occurred, but that such notice shall not be held insufficient solely by reason of any inaccuracy or failure in describing the place and the insufficiency, provided it shall appear that there was no intention to mislead the other party, and that such party was not in fact misled thereby. In an action for personal injuries happening on a sidewalk in front of a certain lot, the circumstances surrounding the giving of the statutory notice of claim for damages showed that the notice was given in good faith, and without intent to mislead, though it stated the place of injury to have been on the side of a certain block 600 feet in length. Defendant's street commissioner testified that on the day of the accident he was notified of the defective condition of the sidewalk at the place of the injury, and repaired it the succeeding Monday, and none of defendant's witnesses suggested any difficulty in meeting plaintiff's claim by reason of any uncertainty as to the place of accident. *Held*, that the notice was not insufficient because it failed to identify the place of the accident with more particularity.
3. In an action for personal injuries happening from a defective sidewalk, the principal defense was that of contributory negligence in walking over a sidewalk known by plaintiff to be defective. Evidence was offered by plaintiff of the poor condi-

tion of the sidewalk on the opposite side of the street, which, on objection offered, was stated to be offered simply to show that there was no safe chance to walk thereon. *Held* that, for the purpose definitely stated when it was offered, the evidence was admissible.

4. Where a woman, thirty-three years of age, and quite heavy, suffered a partial dislocation of her ankle, which confined her to her bed for nearly a month, and from which she had not fully recovered at the time of the trial, a year and a half later, a verdict for $1,000 damages is not excessive.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action for personal injuries. It appeared upon the trial that on November 20, 1900, the plaintiff, while walking on a sidewalk on the west side of Thirty-Seventh street, between Hammond and Custer avenues, in the defendant village, was tripped by loose boards in the sidewalk, and fell, receiving serious injuries. A special verdict was returned by the jury, by which they found (1) that the plaintiff was injured by falling on the sidewalk at the time and place named; (2) that the sidewalk was defective at the place of the injury; (3) that it had been defective since November 6, 1900; (4) that the defect was the proximate cause of the plaintiff's injury; (5) that the officers of the defendant village had actual notice of the defect in time to have repaired the same, in the exercise of ordinary care; (6) that the defect had existed so long before the injury that the defendant's officers ought to have known and repaired the defect in the exercise of ordinary care; (7) that the plaintiff was not guilty of contributory negligence; (8) that the plaintiff's damages were $1,000. A motion to set aside the verdict and for a new trial was overruled, and judgment rendered for the plaintiff upon the verdict, and the defendant appeals.

For the appellant there was a brief by *E. J. Henning,* attorney, and *Howard Van Wyck,* of counsel, and oral argument by *Mr. Henning.*

*J. M. Clarke,* for the respondent.

WINSLOW, J. The fact that the plaintiff fell upon the sidewalk and was injured at the time claimed by her was not disputed upon the trial, nor is it now claimed that the evidence was insufficient to justify the findings of the jury to the effect that the sidewalk was in a defective condition, that the defects were the proximate cause of her fall, and that the defects had existed such a length of time as to charge the defendant with the duty of repair.

The appellant claims, however, (1) that the evidence shows contributory negligence as matter of law; (2) that the notice of injury under sec. 1339, Stats. 1898, was insufficient; (3) that certain evidence was erroneously admitted; and (4) that the damages are excessive. These claims will be briefly considered.

1. The evidence shows that the plaintiff was walking upon the sidewalk in question at about eight o'clock in the morning. She testified that she was walking carefully, and saw nothing wrong with the walk until a board tipped sideways as she stepped on it with her right foot, and caught her left foot, throwing her to the ground and seriously injuring her ankle; that she saw no missing board in the walk before she fell, but that afterwards there were several boards loose and disarranged, and one board altogether missing; that she frequently passed over the walk before her fall; that the accident happened on Tuesday, and she had passed over the sidewalk on the Sunday previous, and noticed nothing wrong and no boards missing. The testimony of other witnesses tended to show that there was one board entirely missing, and that two or three boards were loose, but lying in their places. The argument is that because it seems to be established that one board was missing, and that fact was plain to the view, hence she must have been guilty of contributory negligence in not noticing the fact and taking greater precautions. If the testimony showed that her fall was occasioned by stepping into the hole left by the missing board, the conclusion would prob-

ably be unavoidable, there being nothing to show that her attention was in any way distracted; but her testimony is positive that her fall was not caused by the hole, but by the tipping of a board which was lying in its proper place, and apparently in good condition. Under this testimony the question of contributory negligence was properly for the jury, and not for the court.

2. The notice given under sec. 1339, Stats. 1898, stated that her fall was caused by loose and broken boards, one of which turned over and tripped her up. It did not specify the place where the boards were loose, except by stating that it was on the west side of Thirty-Seventh street, between Hammond and Custer avenues. It appeared that the block between Hammond and Custer avenues was 600 feet in length, and that there were at least two other places in the block where boards were loose or broken, and the defendant claims that the notice was insufficient because it did not identify the place with sufficient particularity. The point would seem to be well taken were it not for the amendment of the section by ch. 85, Laws of 1893, now incorporated in the section, by which it is provided, in substance, that such notice shall not be held insufficient solely by reason of any inaccuracy or failure in stating the time or in describing the place and the insufficiency, *provided* it shall appear that there was no intention to mislead the other party, and that such party was not in fact misled thereby. Undoubtedly, the burden of proving that there was no intention to mislead and no misleading in fact is upon the plaintiff, but these facts may be inferred from circumstances, without direct testimony to the point. *Bowes v. Boston,* 155 Mass. 344, 29 N. E. 633. The defect here was not in describing the defect or in stating the time, but simply in failing to definitely locate the point within the 600 feet. We are clearly of opinion that the circumstances show that the notice was given in good faith, and without intent to mislead or deceive. As to whether there was any

actual misleading of the defendant from the indefinite location of the place in the notice, we also think that the evidence negatives any such conclusion. The evidence shows that the place of the accident was in front of lot 7, just north of the residence of one Madden. It appears also by the testimony of the street commissioner of the defendant that he was personally informed that the sidewalk in that block was defective on the evening of November 20th, and that he took some lumber and repaired three places in the block on the morning of November 21st, and he identifies the place of the accident in front of lot 7, and states that two planks were loose and a third one altogether missing, and that he put in one new plank and some short stringers, and nailed down the loose planks. So far as appears, the defendant introduced all of the testimony which it could have offered, even had the place of accident been located in the notice as in front of lot 7. As the place of the accident was repaired on the day following, and nearly two weeks before the notice was served, the village could not, by examination of the walk after receiving the notice, have ascertained what the condition was before the accident. It appears also that the defendant called one or two witnesses as to the condition of the sidewalk at this very spot, and no suggestion was made at the trial that any difficulty had been experienced in meeting the plaintiff's claim by reason of any uncertainty as to the place of the accident.

3. Evidence was received, against objection, that the sidewalk on the *east* side of Thirty-Seventh street, between Hammond and Custer avenues, was in very poor condition, and this is alleged to have been error. When the evidence was introduced and objection made, plaintiff's counsel stated that it was offered simply to show that there was no safe chance to walk upon it. Counsel for appellant rightly claims that, in such an action as the present, evidence of other defects in the highway at a distance from the place of accident is not

admissible to prove that the alleged defect in question existed or was an actionable defect. *Olson v. Luck,* 103 Wis. 33, 79 N. W. 29. In the present case, however, the testimony was offered for no such purpose nor could the jury have so understood it. The principal defense made was that of contributory negligence in walking over a walk which she knew was defective, and this had already been foreshadowed by the cross-examination of the plaintiff. In view of this claim, it was proper to show that the other walk on which presumably she might have traveled was defective, as bearing on the question of her care. Had there been no sidewalk of any nature on the other side of the street, or had it been impracticable for any other physical reason to walk on the other side, it would hardly be claimed that it would be error to show the fact as bearing on the question of care in traveling. The purpose of the evidence was quite definitely stated when it was offered, and we think that for the purpose stated it was admissible.

4. The damages are claimed to have been excessive, but we cannot agree with the contention. The plaintiff was a woman thirty-three years of age, and quite heavy. Her ankle was partially dislocated, and she was confined to her bed nearly a month, and had not fully recovered at the time of the trial, more than a year and a half later. She also suffered internal injuries of a somewhat serious nature.

*By the Court.*—Judgment affirmed.

GALLAGHER, Respondent, vs. RUFFING, Appellant.

*May 13—May 29, 1903.*

*Vendor and purchaser of land: Payment: Certificates of deposit: Indorsement by vendee: Presumptions: Negligence: Laches: Negotiable instruments: Protest.*

1. Where a vendee of land delivered to his vendor as part of the purchase price certificates of deposit, which the vendee indorsed in blank, without reservation, it will be presumed that the certificates were not taken in payment, in the absence of evidence to that effect.
2. A vendee of land, as part payment therefor, indorsed in blank and delivered to his vendor a certificate of deposit, payable on demand, but, according to its terms, drawing interest only in case it ran until July 16. The vendor paid the vendee the amount of interest that had accrued to the day of the transfer, and, on July 16, transferred the certificate to a bank to be put in process of collection. The certificate was not paid, the bank issuing it having failed July 17, before it was presented. *Held*, that the vendor's conduct did not justify an inference of negligence responsible for the loss.
3. In such case, in an action by the vendor to recover the unpaid purchase price represented by such certificate, it is no defense that he failed to properly protest the certificates on payment being refused; the action being brought not on the liability of the vendee as an indorser, but on the original liability of the vendee to pay the purchase price.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

About May 25, 1901, the plaintiff sold to the defendant a farm and personal property at an agreed price of $9,000, and received from the defendant three certificates of deposit—one in the First National Bank of Milwaukee, $1,500, and two in the German Exchange Bank of Chilton for $3,000 and $200, respectively; also $300 in money, and a mortgage back for $4,000. The Milwaukee certificate of deposit was duly cashed. The two certificates in the German Exchange Bank were payable on demand, but, according to their terms, drew interest only in case they ran three months, to wit, until July

16, 1901. The plaintiff paid defendant the amount of accrued interest to day of transfer. At the time of the purchase all of the certificates were indorsed in blank by the defendant, and delivered to the plaintiff. On July 16, 1901, the $3,000 certificate of deposit was transferred by plaintiff to Citizens' Bank of Oconto. Nothing was done with the $200 certificate. On July 17th, at the close of business hours, the German Exchange Bank of Chilton was closed by the state bank examiner. The plaintiff shortly thereafter tendered back the $3,000 and $200 certificates of deposit, and brings this action to recover so much of the purchase price of the land. The court found that there was no express agreement between the parties that the certificates should be received as part payment of the purchase price, and concluded from that fact that they were not so received, and that $3,200 of the purchase price, with interest, was still due, for which judgment was rendered against the defendant, who appeals.

*J. E. McMullen,* attorney, and *P. O'Meara,* of counsel, for the appellant.

For the respondent there was a brief by *Geo. C. Hume* and *Nash & Nash,* and oral argument by *L. J. Nash.*

Dodge, J. The rules of law affecting the conclusion in this case are simple and well-established in this state. They are, briefly, that the giving of the promissory note or other evidence of indebtedness of a third person upon the purchase of property is presumptively in payment *pro tanto* of the agreed price. Indorsement thereof, so as to make the purchaser liable thereon, suffices to wholly overcome that presumption, and to cast the burden upon him to establish an actual agreement that the paper is so received. In the absence of such proof, it will, when so indorsed, like his own note, be presumed to have been received only as security for the purchaser's own continued indebtedness for the purchase price. *Ford v. Mitchell,* 15 Wis. 304; *Willow River L. Co. v. Luger*

*F. Co.* 102 Wis. 636, 78 N. W. 762. In the present case the certificates of deposit were, of course, merely evidences of indebtedness of the respective banks to the defendant, *Ruffing.* He indorsed the same generally, and without reservation. Presumptively, therefore, they were not received in payment, and the question of fact arose whether there was an actual agreement that they should be so received. Upon that subject considerable testimony was taken; much of it, we confess, tending strongly toward the establishment of such actual agreement. But there was also evidence in negation thereof, and the trial court, after hearing this testimony, seeing the witnesses, and having all those well-recognized advantages which the trial court enjoys over the appellate tribunal, has deliberately found that no such agreement was proved. After a careful perusal of all the evidence, and with some reluctance, arising from the very persuasive character of certain of the testimony and the circumstances, we are constrained to the conclusion that we cannot discover that there is any such clear and overwhelming preponderance which justifies this court in setting aside a finding already made. It is in deference to this rule that we conclude that the finding must stand.

From this, of course, it results that the balance of the purchase money of the farm sold by the plaintiff has not been paid, and the defendant is liable therefor. To this result the appellant presents as an objection the contention that the plaintiff's own negligence and laches were responsible for the failure to realize the money upon the two certificates of deposit in the German Exchange Bank. Of course, the pledgee or bailee of these certificates of deposit owed the duty of reasonable care and diligence. It is, however, made apparent that in the original transaction he was expected not to present them for collection until the expiration of the three months, only at the end of which interest was payable thereon. No other inference is consistent with the fact that he allowed

and paid to the defendant the accrued interest up to the time of their delivery to him. Hence, until that time arrived, no laches or lack of diligence could be ascribed to him, in absence of information tending to throw doubt on the solvency and responsibility of the bank. On the day when interest became due, he proceeded to put the $3,000 certificate in process of collection, and immediately upon learning of its dishonor hastened to the bank, but, of course, found all efforts at collection futile, it then being in the custody of the bank examiner as insolvent. This conduct would not justify an inference of any negligence responsible for the loss.

Some further suggestion is made that certain attempts to protest were not strictly formal, or in compliance with the law; but the plaintiff owed no duty of protest as against the defendant. He does not sue upon the liability as indorser, but, after tendering back these certificates held as security, he sues upon the original liability of the defendant to pay the purchase price for the farm. This he can do upon authority of the case above cited. We can find nothing to avert the result reached by the trial court.

*By the Court.*—Judgment affirmed.

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THE STATE EX REL. MCCOALE and others, **Respondent, vs.** KERSTEN and others, Appellants.

*May 13—May 29, 1903.*

***Municipal corporations: Charter provisions: Conflicting statutes: Revision: County board: Membership: Constitutional law: Uniformity of county government: Certificate of election: Presumptions: Public officers:*** Mandamus.

1. The charter of the city of Chilton, as amended by sec. 6, ch. 49, Laws of 1878, provides that "the elective officers of said city shall be a mayor, who, by virtue of his office, shall be supervisor of said city, and as such shall be the sole representative

of and for said city in the county board of supervisors." Sec. 19, subch. XI, of said charter (ch. 89, Laws of 1877), provides that "no general law of this state contravening the provisions of this act shall be considered as repealing, amending, or modifying the same, unless such purpose shall be expressly set forth in such law as an amendment to this chapter or this act." Secs. 662, 663, Stats. 1898, provide that every ward of a city shall be represented in the county board by one supervisor, elected annually by the electors of said ward, and sec. 4986 provides that all laws contained in the statutes shall be in force in cities, so far as applicable and not inconsistent with their charters, "but when the provisions of any such charters are at variance with these revised statutes, the provisions of such charter shall prevail, unless a different intention be plainly manifested." *Held*, that the special provision of such charter relating to representation on the county board was in force as enacted by special act of the legislature, and was not intended to be repealed by the general revision of the subject in the Statutes of 1898.

2. Such charter provision, making the mayor, as such, sole representative of the city of Chilton in the county board of Calumet county, when secs. 662, 663, Stats. 1898, provide for a representative from each city ward, does not violate sec. 23, art. IV, Const., requiring town and county government to be as nearly uniform as possible.
3. When the election of an official was duly certified by the proper officer, it must be presumed that a proper canvass of the vote had been had before such certificate issued, and that the canvassing officers determined that such official was duly elected.
4. In such case, until steps are taken to review such determination, the person holding the certificate of election to office must be held entitled thereto as against any intruder, or against all the world except a *de facto* officer, in possession of the office under color of authority.
5. Where persons claim to be elected to an office, and they hold certificates of their election and qualification from the proper officers, *mandamus* is the proper remedy to obtain possession of the office.

APPEAL from an order of the circuit court for Calumet county: JAMES J. DICK, Judge. *Reversed.*

This is an appeal from an order refusing to quash the proceedings for writ of *mandamus*. This proceeding was insti-

tuted by relators, who respectively claim to be the duly elected supervisors from the three wards of the city of Chilton, at the election held in that city April 2, 1901. Their election to office, and that they qualified as supervisors for their respective wards, was certified to the county clerk of Calumet county by the clerk of the city on April 3, 1901, and filed in the office of the county clerk on April 5, 1901. The relators severally appeared at the opening session of the county board of supervisors of Calumet county on November 12, 1901, and demanded, and assumed to exercise, the right to participate in the proceedings of said county board of supervisors as supervisors of their respective wards. The board of supervisors by resolution refused to allow relators to participate in the proceedings, and declared the mayor of the city of Chilton, under the city charter, to be the sole representative in the county board of supervisors. Relators seek in this proceeding to command said board to admit them to membership in the board of supervisors, and permit them to participate in the proceedings thereof.

For the appellants there were separate briefs by *James Kirwan* and *P. H. Martin,* and oral argument by *Mr. Martin.*

*J. E. McMullen,* for the respondent.

SIEBECKER, J. It is contended on the part of relators that they were the lawfully elected supervisors of their respective wards of the city of Chilton under the general law providing for the representation of every ward in every city in the state upon the county board of supervisors. See secs. 662, 663, Stats. 1898. This presents the question of the validity of the provisions of the act incorporating the city of Chilton, and the acts amending the same, by the terms of which the mayor of said city is declared to be the sole representative for the city in the board of supervisors of Calumet county.

The charter of the city, as amended by sec. 6, ch. 49, Laws of 1878, provides:

"The elective officers of said city shall be a mayor, who, by virtue of his office, shall be supervisor of said city, and as such shall be the sole representative of and for said city in the county board of supervisors of said county of Calumet. . . ."

Sec. 19, subch. XI, of the charter (ch. 89, Laws of 1877), is as follows:

"No general law of this state contravening the provisions of this act shall be considered as repealing, annulling or modifying the same, unless such purpose be expressly set forth in such law as an amendment to this chapter or this act."

The right of the legislature to prescribe how the city of Chilton shall be represented in the county board of supervisors, under the constitutional power to incorporate cities as municipal corporations and designate what officers shall be elected or appointed for the administration of its affairs, was not questioned upon the argument, except that the exercise of such power shall be in conformity to sec. 23, art. IV, Const., providing that but one system of town and county government, as nearly uniform as practicable, can be established. No legislation has been enacted which expressly repeals these provisions of this charter, unless secs. 662 and 663, R. S. 1878—preserved in the Statutes of 1898—operate as a repeal thereof. These sections provide:

"Every ward or part of ward of any city . . . shall be represented in the county board, in which any such ward or part thereof, or city or village, or part thereof, is situated, by one supervisor; all such supervisors shall be elected annually by the electors of such ward, or parts of wards." And further: "The county board of supervisors shall consist of the chairmen of the several towns and the supervisors of each ward, and part of a ward of every city, and of each incorporated village or part thereof."

The general scope of these provisions covers all cities and villages of the state, yet the statutes expressly except from their application cities whose charters are in conflict therewith. Sec. 4986 specifically declares all laws contained in the statutes shall be in force in cities, so far as applicable and not inconsistent with their charters, and specifically declares:

"But when the provisions of any such charters are at variance with these revised statutes, the provisions of such charter shall prevail unless a different intention be plainly manifested."

The statute last quoted was plainly designed to repel any presumption that the general statutory provisions were intended to repeal special provisions relating to certain municipal corporations or the officers thereof, unless specifically designated, and provides that none of the general provisions of the statutes shall be so construed as to affect or repeal the provisions of any special acts relating to particular municipal corporations or the offices or officers thereof.

These express declarations on the part of the legislature show plainly that special legislative acts, such as municipal charters, are not intended to be repealed, directly or by implication, by a general revision of the subject in such statutes, where the specific subject is otherwise covered by such charters. The charter must be held to be in force as enacted by special act of the legislature.

It becomes necessary, therefore, to determine whether the provisions of the charter making the mayor, as such, the sole representative of the city of Chilton in the board of supervisors of the county of Calumet, violate sec. 23, art. IV, Const. This section declares:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

The charter provision cannot be said to violate the unity of the plan of county government contemplated by this provision of the Constitution. The board of supervisors, as constituted in Calumet county, exercises the same powers, and in the same manner, as like boards throughout the state. The system of county government in all respects is the same in this as in every other county. Does the special charter act violate the uniformity of the system of county government by declaring that the mayor, by virtue of his office, shall be the supervisor, and as such the sole representative of and for said city in the county board of supervisors for said county? The general system of county government is a representative system, where some one is chosen as a representative from some prescribed district or territory, embracing the whole or a part of a municipal corporation as a political subdivision of the county, without regard to absolute equality of number in population, or sameness of area, or designation of such municipal subdivision. Absolute uniformity is not demanded, but uniformity as nearly as practicable is required. The legislature determined that uniformity of representation in this county board as constituted would be attained, within the scope and intent of this constitutional provision, by having the city of Chilton represented by its mayor alone. And, when the qualified voters of the city elect him to the office of mayor, they thereby exercise their right to select their representative in the county board of supervisors.

We are unable to say that the principle of unity and uniformity of the system of county government prescribed has thereby been interfered with. *State ex rel. Peck v. Riordan,* 24 Wis. 484; *State ex rel. Grundt v. Abert,* 32 Wis. 403; *State ex rel. Atty. Gen. v. Cunningham,* 81 Wis. 440, 51 N. W. 724.

It is contended relators have mistaken their remedy, and that *mandamus* is not an appropriate remedy to enforce their rights. It appears that relators' election as supervisors for

their respective wards was duly certified to the county clerk by the proper city officer. It must be presumed that a proper canvass of the vote was had before such certificate issued, and that the canvassing officers determined that relators were duly elected. While such determination may be subject to inquiry and revision, yet, until such steps are taken, the person holding the certificate of election to office must be held entitled thereto as against any intruder, or against "all the world except a *de facto* officer in possession of the office under color of authority." *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296; *State ex rel. Gill v. Milwaukee Co.* 21 Wis. 443. If each ward of the city of Chilton had been entitled to representation in the county board of supervisors, then it was the right of relators to be admitted to the office under their *prima facie* title, and maintain possession thereof until some other person in a proper proceeding at law should deprive them of that right; and *mandamus* is the proper remedy to obtain possession of the office. *State ex rel. Jones v. Oates, supra,* and cases cited. No necessity arises to determine whether *quo warranto* proceedings might not be instituted to contest relators' *prima facie* title to the office in question had their election been valid under the charter of the said city of Chilton.

Upon the conclusions as herein expressed, the proceedings on the part of the relators to obtain possession of the offices must be dismissed. The order refusing to quash the proceedings for writ of *mandamus* must be reversed. This result renders unnecessary any consideration of other questions presented by counsel in their briefs.

*By the Court.*—The order of the circuit court is reversed, with directions to quash the writ.

HEMINGWAY, Respondent, vs. JOINT SCHOOL DISTRICT No. 1 OF THE TOWNS OF OAK GROVE AND HUBBARD AND THE CITY OF HORICON, Appellant.

*May 14—May 29, 1903.*

*Schools and school districts: Contracts with teachers: Authority of board:* Stare decisis.

Acting under sec. 438, Stats. 1898 (providing that the school district board shall contract with qualified teachers, specify in the contract the wages per week, month or year to be paid, and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk), and sec. 430 (providing that the voters at the annual school district meeting shall have power to determine the length of term a school shall be taught in their district the then ensuing year, which shall not be less than six months, and whether such school shall be taught by a male or female teacher, or both, and whether the school money to which the district shall be entitled from the school fund income and from the town shall be applied to the support of the summer or winter school or a portion to each, but if such matters shall not be determined at the annual meeting, the district board shall determine the same), the district board, on June 13, duly entered into a written contract with plaintiff, a qualified school teacher, to teach its high school for the ten months commencing September 4, next. At the annual school meeting held on the intervening July 3, a resolution was passed directing the district board to cancel the contract with the plaintiff, and employ another teacher. Plaintiff, when notified of the action of the annual meeting, refused consent thereto, and attempted to carry out the contract on September 4, but was prevented from so doing by defendant's officers, and expelled from the school building. *Held*, that the power of the district board to contract with plaintiff was general, and (in the absence of contrary directions by the voters at the last annual meeting upon the special subjects prescribed by said sec. 430, and subject to their power at the next meeting, or of the new board, to determine with respect to such special subjects), the school district was liable to plaintiff for breach of the contract made by the district board.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action brought by a school-teacher to recover damages for breach of a contract of employment. Trial by jury was waived, and the case tried by the court. The facts are not in dispute, and, as found by the court, were in substance as follows: The defendant is a duly organized school district, maintaining a free high school. In 1899 the plaintiff was a qualified school-teacher, and eligible to the position of principal of the high school. June 13, 1899, the district board of the defendant school district entered into a written contract in due form with the plaintiff, by which the plaintiff agreed to teach the free high school of the district, as principal thereof, for ten months, commencing September 4, 1899, and the defendant agreed to pay the plaintiff $95 per month. At the annual school meeting of the district held July 3, 1899, a resolution was passed directing the district board to cancel the contract with the plaintiff and employ another teacher. The plaintiff was notified of this action, but refused to consent to the cancellation of the contract; and on the morning of September 4, 1899 (being the morning on which the fall term of school opened), he was present at the schoolhouse, and insisted on carrying out his contract, but was prevented from so doing by the defendant's officers, and expelled from the building. The plaintiff used due diligence in finding other employment, and necessarily expended $56 in searching for other employment, and succeeded in earning thereby $488.25 during the ten months. The court concluded that the contract was valid and binding, and that the action of the district meeting in attempting to cancel the same was void, and that the contract had been breached by the refusal of the district to allow the plaintiff to perform the same, and that the plaintiff was entitled to recover the difference between the contract price and the amount which he had been able to earn elsewhere, to wit, $590.37. Judgment

was rendered for the plaintiff for this amount and costs, and the defendant appeals.

*M. L. Lueck,* attorney, and *H. K. Butterfield,* of counsel, for the appellant.

For the respondent there was a brief by *Sawyer & Sawyer,* and oral argument by *E. W. Sawyer.*

WINSLOW, J. In this case the district board in June entered into a contract in due form with a qualified teacher to teach the school for the next school year, which did not begin until after the annual district meeting in July; and the district meeting assumed to cancel the contract, and the question is whether it had that power.

Our statute (sec. 438, Stats. 1898) provides, in general terms:

"The board shall contract with qualified teachers, specify in the contract the wages per week, month or year to be paid, and when completed file the contract, with a copy of the certificate of the teacher so employed attached thereto, with the clerk."

Sec. 430 of the same statutes also provides that the voters at the annual school district meeting shall have power "to determine the length of time a school shall be taught in their district the then ensuing year, which shall not be less than six months, and whether such school shall be taught by a male or female teacher, or both, and whether the school money to which the district shall be entitled from the school fund income and from the town, shall be applied to the support of the summer or winter school or a certain portion to each, but if such matters shall not be determined at the annual meeting, the district board shall determine the same."

The appellant contends that these provisions clearly indicate that the legislative intent was to limit the powers of the district board in making contracts with teachers to the current year, or at least to limit the board to contracts commencing during the current year, and that they have no power, as

against the will of the voters, expressed at the annual meeting, to make a contract which is not to begin until the next school year. The powers given to the voters at the annual school meeting tend quite strongly to sustain this contention, and, were the question a new one in this court, we should experience considerable difficulty in avoiding the conclusion. The question is not a new one, however. In *Webster v. School Dist. No. 4,* 16 Wis. 316, the same question was presented, under statutes substantially the same as those above cited; and it was held that the power of the board to contract was general, in the absence of an inconsistent determination of the voters at the last annual meeting, and subject to their power at the next (or of the new board) to determine with respect to the length of time a school should be taught, whether by a male or female teacher, or both, and the application of the school moneys. In that case it was, in effect, decided that such a contract was valid and binding unless the voters at the annual meeting, or the new board in case of neglect of the voters, give contrary directions upon the special subjects prescribed by the statute, to wit, the sex of the teacher, the length of the school year, and the application of the school moneys. The fact that in that case the contract was partly performed during the current school year, and extended into the next school year about a month, makes no difference with the principle. This decision was made more than forty years ago, and has doubtless been frequently acted on since that time. The legislature has not seen fit to materially change the statute during that time, and has apparently acquiesced in the construction so given to it by the court. Under the circumstances, we do not feel that it should now be overruled. It is a persuasive case for the application of the rule of *stare decisis.*

*By the Court.*—Judgment affirmed.

SCHNEIDER, Appellant, vs. CITY OF MENASHA and others, Respondents.

*May 14—May 29, 1903.*

***Municipal corporations: Contracts: Powers outside corporate boundaries: Purchase of stone quarry outside of city limits: Right to hold:*** Ultra vires.

1. The general rule that the authority of a municipal corporation does not extend beyond its corporate boundaries does not apply to its mere business functions, but does to its governmental authority.
2. As to the mere business side of a municipal corporation's affairs, what constitutes a public purpose inside its boundaries does not become otherwise by passing beyond such boundaries.
3. A municipal corporation possesses, as incidental to its express powers and the object of its existence, implied authority to do those things essential to efficiently accomplish the latter, and all those powers germane and reasonably necessary or convenient to the efficient exercise of the former.
4. A city having express authority to grade and pave streets and to purchase and hold all real estate necessary or convenient for its use, has, by implication therefrom, authority to use all reasonable methods of executing the same, including that of purchasing a stone quarry within or without its corporate limits for the purpose of obtaining therefrom raw material from which to manufacture crushed rock.
5. The limit of the distance from the boundaries of a city within which it may legitimately exercise its mere right to own and use property for municipal purposes, is governed by the nature of the particular end in view, to be determined by the exercise of discretion, the uttermost limit being at the point where reasonable convenience, considering the end and the means, is perceptible, to be determined by the exercise of human judgment in very much the same way that a private corporation would solve a like question under the same or similar circumstances.
6. Respecting an executed contract with a private corporation, neither party thereto, as a general rule, can invoke the doctrine of *ultra vires* either in attack or defense in a judicial proceeding, the violation of law being solely a matter for sovereign authority to deal with; but that does not apply to contract transactions with a municipal corporation.

7. Subject to an exception next to be noted, a person dealing with a municipal corporation is conclusively presumed to know the limits of its power, and cannot, therefore, successfully plead ignorance thereof to save himself from loss, whether the contract be executed or not.
8. If a contract be made by a corporation with a person, beyond the scope of its power, not, however, expressly prohibited by its charter or any law, if there be no bad faith in the matter in fact, and in and by the same, property of such person passes into the possession of the corporation and is actually used by it for legitimate corporate purposes, a cause of action will thereby accrue in favor of such person on equitable grounds to recover the value of such benefit, not exceeding that of the money or property acquired and used.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Taxpayer's action to restrain defendant city and its officers from consummating a contract to purchase a tract of land just outside the corporate limits of the city, from which to obtain stone for manufacturing crushed rock for city purposes. The complaint contained all the necessary allegations to raise the question of whether the city possessed power to do the act sought to be prevented. The defendant city answered that the purpose of purchasing the land was to obtain a supply of crushed rock for use upon the city streets, and that such land was conveniently located for such purpose. A motion for a preliminary injunction was denied, and plaintiff appealed.

*J. C. Kerwin,* for the appellant, contended, *inter alia,* that equity will restrain misappropriation of funds of a city for unlawful purposes. 2 Dillon, Mun. Corp. (4th ed.) § 917 (732); 2 High, Inj. § 1241; *Bay L. & I. Co. v. Washburn,* 79 Wis. 423; *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167; *Frederick v. Douglas Co.* 96 Wis. 416; *Trester v. Sheboygan,* 87 Wis. 496; *Mueller v. Eau Claire Co.* 108 Wis. 304; *Kyes v. St. Croix Co.* 108 Wis. 136. In the absence of express legislative authority the city had no power to make the pur-

chase. 2 Dillon, Mun. Corp. (4th ed.) § 565 (435); Tiedeman, Mun. Corp. § 201; *Riley v. Rochester,* 9 N. Y. 64; *Trester v. Sheboygan,* 87 Wis. 496; *Duncan v. Lynchburg* (Va.) 48 L. R. A. 331; *Concord v. Boscawen,* 17 N. H. 465; *Chambers v. St. Louis,* 29 Mo. 543; *Hafner v. St. Louis,* 161 Mo. 34. The exception to the general rule that municipal corporations cannot purchase real estate beyond their corporate limits, except by express grant, embraces only cases coming within the police power, or of indispensable necessity. 2 Dillon, Mun. Corp. (4th ed.) § 565 (435); Tiedeman, Mun. Corp. § 201; *Duncan v. Lynchburg* (Va.) 48 L. R. A. 331. General authority found in city charters to purchase real estate without specification as to locality means within the corporate limits of the city. *Riley v. Rochester,* 9 N. Y. 64; Stats. 1898, sec. 925—52, subd. 25; ch. 55, Laws of 1899; *Thompson v. Moran,* 44 Mich. 602. Under the ordinary rule of construction of statutes the power conferred to purchase land for certain purposes inside of the limits excludes by implication the right to purchase for any other purpose. *Duncan v. Lynchburg* (Va.) 48 L. R. A. 331; *Paine Lumber Co. v. Oshkosh,* 89 Wis. 449; 2 Dillon, Mun. Corp. (4th ed.) § 563; *Thompson v. Moran,* 44 Mich. 602; *Chambers v. St. Louis,* 29 Mo. 543; *Hafner v. St. Louis,* 161 Mo. 34; *Somerville v. Waltham,* 170 Mass. 160.

For the respondents there was a brief by *Bouck & Hilton* and *J. M. Pleasants,* and oral argument by *Gabe Bouck.*

MARSHALL, J. Respondents urge in support of the order appealed from the doctrine that, respecting an executed contract, only the state can invoke the doctrine of *ultra vires* to challenge the right of a corporation to exercise power beyond the scope of its charter. That doctrine is applied quite generally to private corporations. It is not, however, to public corporations. The numerous cases decided by this court, establishing the right of taxpayers to intervene to prevent the

unlawful disposition of public money or to compel its restoration, clearly indicates that. *Webster v. Douglas Co.* 102 Wis. 181, 77 N. W. 885, 78 N. W. 451; *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. It is deemed so unsafe to allow the officers of a municipality to bind it beyond the scope of its powers, that all persons are held firmly to the rule that, in dealing with such a corporation, they are presumed to know the limit of its authority and act at their peril. The result is that no one can successfully plead ignorance to save himself from loss in dealing with a municipality as to matters expressly prohibited, nor as to any matter beyond the scope of corporate authority except in case his money or property has actually been used for legitimate corporate purposes. In that event, on equitable grounds, the court will afford a remedy to the extent of the corporate benefit, but no further. *Thomson v. Elton,* 109 Wis. 589, 85 N. W. 425; Beach, Pub. Corp. § 219.

Counsel for appellant bring to our attention a number of authorities to sustain the contention that a city cannot purchase real estate outside of its corporate limits, but none that seems to really touch the precise question here presented, which is this: Can a city, under its general power to "purchase and hold real estate sufficient for the public use, convenience or necessities" (charter of *Menasha,*—sec. 4, subch. XV, ch. 123, Laws of 1891), purchase real estate outside of its corporate limits convenient for use in obtaining a supply of crushed rock to be used upon the city streets?

The city of *Menasha* had express authority to improve its streets. It had express authority to purchase such real estate as it deemed reasonably necessary or convenient for the city's use. It possessed, by implication, all the powers reasonably necessary to the proper exercise of such express powers, and those essential to the objects and purpose of its corporate existence. *Trester v. Sheboygan,* 87 Wis. 496, 58 N. W. 747. The acquirement of a supply of crushed rock for use upon

the city streets was a legitimate city purpose. That is conceded. It must be conceded, also, that to obtain such supply by the purchase of real estate and manufacturing the crushed rock therefrom within the city limits would be a legitimate exercise of corporate power. Would an act which does not involve the exercise of sovereign authority,—one in the exercise of the ordinary business functions of a city inside the city limits,—cease to be such if performed just over the boundary line or within a convenient distance from the city?

The language of the charter is general. Looking at the literal sense thereof, the city may do business outside its boundaries so far as reasonably necessary to carry out the express powers granted to it, as well as within. It is admitted that a city may own realty outside its limits for purposes which are essential to its welfare, as for a cemetery or pest-house. On that 2 Dillon, Mun. Corp. (4th ed.) § 565, is cited. Judge Dillon, as we shall see later, some time after the text of his work was written, successfully maintained much broader authority for cities. Counsel suggests that if the city can go outside its boundaries for a stone quarry because the corporation needs crushed rock for use upon its streets, it can go to any distance therefor, and that if it can go into the rock crushing business, it can also go into the business of building rock crushers. That argument, though plausible, lacks the merit of novelty, as will hereafter be seen. As an authority peculiarly in point, we are referred to *Duncan v. Lynchburg,* 34 S. E. 964, 48 L. R. A. 331, decided in the supreme court of appeals of Virginia. At first glance the case seems to strongly support counsel's side of the controversy, but upon a careful study thereof it appears that the powers of the charter of Lynchburg were much less liberal than those of the respondent city. Moreover, we find that the authorities cited do not support the extreme views of the Virginia court. The Lynchburg charter only authorized the purchase of property necessary for city purposes. The charter

before us authorizes the purchase of property necessary or convenient for such purposes. The authorities cited by the Virginia court, in the main, bear on the question of exercising governmental powers outside the city. Those that touch on mere rights of ownership, support a view rather contrary to the decision of the court. For example, *Riley v. Rochester,* 9 N. Y. 64, is referred to. The learned counsel here rely upon that and similar cases. The New York court expressly declined to hold that a city cannot take title to realty outside its limits for any purpose. It held that it cannot do so for the purpose of exercising governmental authority over the same. *Coldwater v. Tucker,* 36 Mich. 474, was cited by the Virginia court and is also relied upon here. That holds that a city may own public works outside its boundaries by implied authority under some circumstances.

The rule that a city cannot exercise its governmental authority outside its limits has nothing to do with the case in hand. This court held that it cannot exercise such authority in *Becker v. La Crosse,* 99 Wis. 414, 75 N. W. 84. It at the same time recognized that a city may exercise its mere right to own and use property for legitimate city purposes outside its boundaries. That is very decisively maintained in the following cases, which seem to fully cover the case in hand, so far as decisions in another jurisdiction can do so: *People ex rel. Murphy v. Kelly,* 76 N. Y. 475; *Matter of Application of Mayor, etc.* 99 N. Y. 569, 2 N. E. 642; *Lester v. Jackson,* 69 Miss. 887, 11 South. 114. In the second case cited Judge Dillon appeared for the city of New York and prevailed in the contention that the city possessed power to purchase land outside the city for a park. It was suggested to the court by the opposition, as an indication of the absurdity of that doctrine, that if land outside a city can be held for a park, it can acquire property regardless of distance; that if the city of New York can purchase land three miles from its limits, it can go to the Falls of Niagara or to the Adirondack

Mountains, and can also build and operate a railroad to the premises acquired, and when its right in the matter is challenged, defend upon the plea of city purpose and implied power to subserve the same. That argument was taken seriously by the court and considered, with the result, based upon reason and authority, that a general grant of power as regards those matters which do not involve governmental functions, cannot be fenced about by corporate limits; that what constitutes a city purpose within such limits does not change merely by passing beyond the same. This language was used:

"The truth is that neither in authority, nor in the legislative practice, nor in the common sense of the question is there any basis for declaring that there can be no true and sound municipal purpose which reaches beyond the corporate lines."

The undoubted right to purchase a water supply outside the city was suggested, and the instance was pointed to of New York going for such purpose to a distance of forty miles from the city and expending millions of dollars in that regard. After disposing of the primary question of whether all city purposes end at the corporate limits going outward, and commence at such limits coming inward, the court took up the idea of distance suggested by the illustration given by counsel, and held that power in that regard is limited by the very nature of it; that so long as, considering the end in view, the range of reasonable convenience and adaptation to the exercise of the express power is not overstepped, municipal authority is not exceeded; that when an extreme action shall have been taken, so as to impress the impartial mind of some ulterior purpose, it is time to pause if not to turn backward. That doctrine was indorsed in *Lester v. City of Jackson, supra,* which was another case of buying land beyond the city limits for a park. The language of the court, in substance, was this: A municipal corporation may take and hold land convenient and accessible for a park, although it lies outside the corporate limits, and the charter confers no express au-

thority to own land outside; the city cannot exercise its sovereignty over it, but it can exercise all the rights and powers pertaining to ownership.

It would not be profitable to examine at length the numerous cases called to our attention by appellant's counsel to support his view. It seems sufficient to say that, in the main, they hold that municipal authority in a governmental sense cannot be exercised outside the limits of the municipality. That is in harmony with the decision of this court, as we have seen. It is also in harmony with the view that municipal ownership may reach beyond corporate limits, as held in the cases to which we have referred. When one draws the distinction between mere right to own property for city purposes and the right to exercise sovereign authority over property, the authorities upon which this case was grounded are easily seen not to warrant the result sought.

In testing the question of whether a municipality has exceeded its corporate authority in going outside its boundaries in any given case, we must first determine the purpose in view. If that be found to be the exercise of police authority, or authority to govern in any sense, the conclusion must be that the end does not justify the act. If it be found to be the mere exercise of a business function, the conclusion must be that the mere act of going beyond the boundary does not necessarily involve excess of power. In determining whether corporate authority has been exceeded by reason of distance from the city limits the act in question reaches, we must solve that by an appeal to reason and common sense, keeping in mind that municipal corporations, in their business matters, are governed by very much the same rules as private corporations. *Washburn Co. v. Thompson,* 99 Wis. 585, 75 N. W. 309. It comes down in each case to the exercise of mere human judgment. That being the case, there must necessarily be a wide range within which municipal officers, acting in good faith, may go, and not be guilty of such an abuse of

power as to render their acts, as acts of the city, void. As suggested in the New York case, they may go to the point where to go further would indicate some ulterior motive,—indicate that a legitimate city purpose was no longer in view. That would be true whether the act done were performed within or without the corporate limits. Manifestly, in purchasing real estate for the convenience of a city, the element of convenience will enter into the matter, whether the purchase be made on one side or the other of the boundary line of the corporation. If the agents of the city should go so far from its boundary to obtain land for its use that the element of convenience would be no longer apparent, there would undoubtedly be such an abuse of authority as to render the act void. There is nothing of the kind in this case. It is not questioned, as we understand it, that municipal authority was not exceeded if power existed to purchase land for the purpose of obtaining a supply of crushed rock for use upon the city streets, beyond the city limits, at all. It follows, therefore, that the order appealed from must be affirmed.

*By the Court.*—Order affirmed.

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## VOGT, Respondent, vs. HECKER, Appellant.

*May 14—May 29, 1903.*

*Entire building contract: Partial performance: Rebuilding after destruction: Damages: Costs.*

1. Plaintiff contracted to construct a barn of prescribed dimensions, for a lump sum, upon a foundation and out of materials to be furnished by the owner, and, after the building was partially erected, it was destroyed by a storm. *Held*, that plaintiff could not recover for work done on the destroyed building, on the ground that performance of his contract had been rendered impossible.

2. In such case, plaintiff cannot recover on the ground that when parties contract for the doing of some act with reference to an existing thing, to the performance of which the continued existence of the thing is essential, they impliedly agree that such continued existence shall be a condition of the contract duty.
3. In such case, the plaintiff cannot recover on the ground that the entire contract price for the building did not include the lumber and other materials, unless there was some breach of duty in respect thereto.
4. Where an appellant made no offer in the trial court to allow judgment against him for a conceded sum, he cannot complain of the allowance of costs against him in that court.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Modified and affirmed.*

Plaintiff orally agreed with defendant *Carl Hecker* to erect for him a barn of prescribed dimensions and construction, upon a foundation and out of materials to be furnished by Hecker, for the sum of $125. The foundation and materials were provided, and plaintiff proceeded with the contract so far as to have raised the barn and partly inclosed the upper story, so as to be ready for the receipt of hay, when, by an extraordinarily violent storm, the structure was substantially blown down and destroyed, leaving only a few uprights standing, which, however, had to be taken down, in order that the sills might be straightened and replaced upon the foundation. The parties had some negotiation looking to the replacement of the building in its condition when destroyed, and a division between them of the expense of so doing; but, as the court finds, no agreement was reached. The plaintiff went on and rebuilt the barn substantially according to original specifications, except as to time. He brought this suit, alleging merely the erection of the barn, and an agreement to pay therefor $211.32, for which he claimed judgment and lien. The court allowed judgment as follows: The value of erecting the barn, as measured by the price stipulated in the contract, $125; the value of the work of rebuilding it to the

point where the work had progressed before the storm, $65.15; extras for granary, $10; from which he deducted $10 for certain omissions; total $190.15, plus interest and costs—from which judgment the said defendant *Hecker* appeals.

For the appellant there was a brief by *Schmitz & Burke,* and oral argument by *E. S. Schmitz.*

For the respondent there was a brief by *Nash & Nash,* and oral argument by *A. L. Nash.*

DODGE, J. The rule is a legal commonplace that he who contracts to perform an entire work at an entire price can recover no compensation without completion of the work, although it become unexpectedly difficult, or even impossible, without fault of the other party. *Cook v. McCabe,* 53 Wis. 250, 10 N. W. 507; *McDonald v. Bryant,* 73 Wis. 20, 26, 40 N. W. 665; *Goodman v. Baerlocher,* 88 Wis. 287, 291, 60 N. W. 415; *Williams v. Thrall,* 101 Wis. 337, 341, 76 N. W. 599; *McAlpine v. St. Clara Female Academy,* 101 Wis. 468, 474, 78 N. W. 173; *Adams v. Nichols,* 19 Pick. 275; *School Dist. v. Dauchy,* 25 Conn. 530; *Tompkins v. Dudley,* 25 N. Y. 272. This rule would seem, upon first impression, to conclude the rights of the parties before us, for plaintiff's contract was entire to build a barn of the prescribed dimensions, which he finally did. Defendant makes no objection to paying the contract price. Why should he pay more? He got nothing but that which plaintiff had bound himself to furnish for the agreed price of $125. As answer to that query, plaintiff contends that the original contract was terminated when, by *vis major,* without fault of either party, the partially completed barn was destroyed, whereby, as he urges, the contract to build that barn became impossible. In this last suggestion lurks a fallacy. It was not that barn of which the *framework* was blown down, nor indeed, any particular barn, which plaintiff had contracted to build, but a barn of specified description. That such contract was not rendered im-

possible, except as to the time of completion, is conclusively shown by the event, for a barn such as stipulated was built. At most, the storm made necessary the doing of considerably more work to accomplish the agreed result than would otherwise have been necessary. In pursuance of the same line of thought, plaintiff invokes a rule well recognized—that when parties contract for the doing of some act with reference to an existing thing, to the performance of which the continued existence of the thing is essential, they impliedly agree that such continued existence shall be a condition of the contract duty. This rule has been applied, for example, to agreements to sell specific property; to do work *upon* a specified building or a chattel. *Cook v. McCabe,* 53 Wis. 250, 10 N. W. 507; *McMillan v. Fox,* 90 Wis. 173, 62 N. W. 1052; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 395, 405, 80 N. W. 471; *Clery v. Sohier,* 120 Mass. 210; *Butterfield v. Byron,* 153 Mass. 517, 27 N. E. 667; *S. C.,* with note, 12 L. R. A. 571. This distinction is, of course, obvious between two contracts—one, to do work upon a thing which exists, or for the creation of which another is responsible; the other, to fully create and bring into existence that for which the contract price is to be paid. A simple illustration of the first type is *Cleary v. Sohier, supra,* where the contract was to do the lathing and plastering upon a specified building, perhaps not existent when contract was made, but which others than the plasterer were to bring into existence. More complex and extreme illustrations, though involving exactly the same principle, are presented in *Cook v. McCabe* and *Butterfield v. Byron, supra.* There the contractor was to do a much larger and more integral part of the work of bringing buildings into existence. In the *Cook Case* he was to construct all the masonry part, the owner or other contractors constructing the rest as the masonry work proceeded, while in *Butterfield v. Byron* the plaintiff was to do all the other part of the building work, except the masonry and plumbing and painting.

In neither case was it possible for the building to exist so that the contractor could perform his work without the doing of the work of the others; hence it was very properly held in those cases that the contracts were merely to do work upon buildings belonging to the other party, and not to create such buildings. The case at bar is wholly distinguishable from those cases, for here, the defendant having provided the ground and foundation, the plaintiff bound himself to build the barn. That upon which he was to do his work was the defendant's land and foundation. Had that been engulfed by an earthquake or swept away in a landslide, the parties would perhaps have been brought within the rule now invoked by respondent.

The mere fact that the lumber and materials are not included in the price of the entire contract to build the building, but are to be purchased and paid for in addition, is not sufficient to absolve plaintiff from his contract duty to complete and deliver the barn before he earns any part of the contract price, unless, indeed, there be some breach of the duty to supply such material, of which nothing exists in this case. True, the fact that the owner was to furnish some of the materials for the masonry is mentioned as a circumstance in support of the conclusion reached in *Cook v. McCabe, supra;* but it was not a controlling, nor, indeed, a very important, one. The fact that the owner was to build part of the building to which the masonry was to be added by the plaintiff was sufficient of itself to warrant the decision, and was not substantially aided by the furnishing of lime and sand to be used by the mason.

From the views thus stated, no conclusion is possible, except that plaintiff can recover nothing specifically for the work done prior to the destruction of the building, on the assumption that the original contract then became terminated; nor, upon the theory that it continued, can he recover for the additional expense and labor imposed by reason of the storm.

This renders immaterial the argument urged by respondent—that after the storm the parties agreed that plaintiff should go on and build the barn. Nothing is found by the court of an agreement as to any new terms of payment, and it is found that the reasonable value of the work of building was $125, the same as the contract price; hence, if this finding is construed as declaring a new contract upon a *quantum meruit,* the amount recoverable thereon is only that sum. There is no finding of any agreement to pay for the futile work done prior to the storm. Upon any theory, therefore, the plaintiff could recover only $125 and interest. That amounted at the date of the judgment to $126.07, all excess above which sum awarded by the judgment is erroneous and must be eliminated. Defendant made no offer in the trial court to allow judgment for that amount, and is therefore in no position to complain, as he does, of the allowance of costs against him there.

*By the Court.*—The judgment is modified by reducing the indebtedness adjudged to one hundred twenty-six and 7-100 dollars ($126.07), and the total to two hundred eighteen and 68-100 dollars ($218.68), and, as so modified, is affirmed; appellant to recover costs in this court.

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KOLB, Respondent, vs. CITY OF FOND DU LAC, Appellant.

*May 14—May 29, 1903.*

*Municipal corporations: Streets: Injuries to traveler: Notice of injury: Pleading: Variance.*

**Defendant's charter provided that before an action for injuries happening through the insufficiency or want of repair of any street can be maintained, notice shall have been first given in writing, stating the *place* where and the time when such injury or damage occurred, and the nature and circumstances thereof.**

**Notice of an injury to plaintiff stated that the accident was caused by a pile of dirt " in *First* street, about nine feet *southwest* of the curb of the *northwest* corner of *First* and Macy streets," and that plaintiff was riding "southerly on the west side of Macy street when injured." The complaint stated the place of the insufficiency "on *East First* street" where it intersects Macy street, "about nine feet *southeast* of the curb of the *northwest* corner of *East First* street and Macy street. The two streets intersected at right angles, and the notice was attached to and made part of the complaint. *Held:***

**(1) That the discrepancy between *First* street and *East First* street presented no question of variance for determination on an issue by demurrer.**

**(2) That the discrepancy in location of the place of the accident between "nine feet southwest of the curb of the northwest corner" of the intersection of the two streets, and "nine feet southeast of the curb of the northwest corner" of the same intersection, is slight in its significance, and not a material variance.**

APPEAL from an order of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a demurrer to plaintiff's complaint. The action was brought to recover damages for a personal injury which plaintiff alleges was the result of the unsafe condition of defendant's street. The complaint alleges that East First street and Macy street are public highways in the city, and intersect each other at right angles; that the defective condition of the streets consisted in leaving a pile of dirt or street scrapings in the streets without a guard or light to warn travelers in the nighttime; that the pile of dirt was "about nine feet southeast of the curb of the northwest corner of said Macy and East First streets." A notice of claim and injury was served on the clerk and street commissioner, a copy of which notice was attached to the complaint, and made part thereof. The notice describes the place of accident "at the corner of First and Macy streets," and "about nine feet southwest of the curb of the northwest corner of said First and Macy streets." Defendant demurs to this complaint on the ground that it appears

upon the face thereof that it does not state facts sufficient to constitute a cause of action. The court overruled the demurrer. From this order the defendant appealed.

For the appellant the cause was submitted on the brief of *J. M. Gooding.*

For the respondent there was a brief by *Reilly, Williams & Reilly,* attorneys, and *D. D. Sutherland,* of counsel, and oral argument by *Mr. Sutherland.*

SIEBECKER, J. Appellant contends that the demurrer should be held good upon the ground of a fatal variance between the complaint and the notice of claim and injury. The law of the state makes the giving of a notice of claim for injury and damages in cases of this nature a necessary prerequisite to maintain an action. This rule has been repeatedly announced in the decisions of this court. There is no difference as to the requirement of such notices in cases under the general statutes and those coming within a city charter prescribing specially what such a notice shall contain, and how it is to be served. The charter of the city of Fond du Lac provides that this action cannot be maintained "unless notice shall have first been given in writing . . . . stating the place where and the time when such injury or damage occurred and the nature and the circumstances thereof, and that the person injured will claim damage therefor." In the case of *Harris v. Fond du Lac,* 104 Wis. 44, 80 N. W. 66, this court considered and held that the provisions of sec. 1339, Stats. 1898, which prescribe what notice shall be given as a condition precedent to the maintenance of an action for injuries from a defective highway, do not apply to the defendant city. We are therefore to consider this case under the regulations of the city charter on this subject. As indicated, the charter requires written notice to be served, "stating the place where and the time when such injury or damage occurred and the nature and circumstances thereof." Does the

notice before us describe the place where the injury occurred with sufficient particularity and certainty to point out to the city officers the place where and the nature of the insufficiency alleged to have caused the injury? The notice specifies the place of insufficiency "in First street, about nine feet southwest of the curb of the northwest corner of First and Macy street," while the complaint states the place of insufficiency "in East First street," where it intersects Macy street, "about nine feet southeast of the curb of the northwest corner of East First and Macy street." The first discrepancy to be noticed is that the notice designates the street at the place of injury as First street, and the complaint designates it as East First street. So far as the record discloses anything pertinent to the variation, the two designations may refer to one and the same street. In that view of the situation, this discrepancy can therefore present no question of variance to be determined upon the issue raised on demurrer. Our attention is further directed to the fact that the notice locates the place of insufficiency at a point "about nine feet southwest of the curb of the northwest corner" of the intersection of the two streets, and the complaint locates it at a point "about nine feet southeast of the curb of the northwest corner" of the intersection of these two streets. Appellant complains that the difference in location of the place of insufficiency in the notice and complaint is so misleading that the city officers were wholly unable to ascertain the place of injury, and the nature of the defect complained of. Such a result it is difficult to imagine. Both notice and complaint locate the place of injury about nine feet from the curb of the northwest corner, where the two streets intersect at right angles. The notice designates the place about nine feet southwest, and the complaint about nine feet southeast, from this corner; thus locating the pile of dirt in the street at one of two points within about thirteen feet of one another. It is insisted, however, that, if the city officers had found the place designated

in the notice, they would not, in all reasonable probability, have been led to observe the pile of dirt at the point designated in the complaint, and that a like result would have followed had they repaired to the place designated in the complaint. As a matter of common knowledge, it would seem within all reasonable probability that the ordinary use of the eye would readily have led to the discovery of a pile of dirt or street scrapings, between one and one half feet in height, and about three or four feet wide at the base, in a public street, in the daytime, at a distance of about thirteen feet from the point of observation. There is, however, a statement in the notice to the effect that plaintiff was riding "upon the west side of Macy street, in a southerly direction," when he was injured. As the trial court observed, "If, when he was injured, he was riding south along the west side of Macy street, he could not at the same time be riding west or southeast on First avenue." This statement, in connection with the other description of the place of the insufficiency, pointed out the actual place of injury with sufficient certainty. The discrepancy in location of the place of accident between the notice and complaint is slight in its significance, and is not a material variance. *Hein v. Fairchild,* 87 Wis. 258, 58 N. W. 413; *Barrett v. Hammond,* 87 Wis. 654, 58 N. W. 1053. The demurrer was properly overruled.

*By the Court.*—Order affirmed.

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STOLZE, Appellant, vs. TORRISON and others, Respondents.

*May 14—May 29, 1903.*

*Pleading: Counterclaim: Statutes: "Connected with the subject of the action."*

1. In an action of trespass *vi et armis*, the transaction set forth in the complaint as the foundation of plaintiff's claim was the wrongful and unlawful breaking and entering the close, of

**which the plaintiff was at the time in the quiet and peaceful possession, and malicious prosecution and conspiracy in support of such conduct. The defendant by equitable counterclaim sought to establish title to the *locus in quo* in himself, and to have plaintiff's assertion of title adjudicated to be unfounded. *Held*, that such counterclaim did not consist of a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, nor was it connected with the subject of the action as required by sec. 2656, Stats. 1898.**

**2. Such counterclaim is also demurrable because, if established, it would in no way qualify or defeat the judgment to which the plaintiff might otherwise be entitled.**

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an appeal from an order overruling a demurrer to a counterclaim in an action of trespass *vi et armis* commenced November 5, 1901, against *Torrison, Dellebeck,* and *Uek.* The complaint alleges, in effect, that May 28, 1899, and for many years prior thereto, the plaintiff was in the quiet and peaceable possession of the premises described therein, claiming to be the owner thereof in fee; that, with the intent of disturbing and harassing the plaintiff, and to help out the claim of the defendant *Torrison* to the land, and to compel the plaintiff to relinquish the same, *Torrison* and the other two defendants wrongfully and unlawfully conspired, confederated, and combined and entered upon the premises with force and arms and with a multitude of people, and damaged the plaintiff's crops, and assaulted and beat the plaintiff and the members of his household, and made false and fraudulent charges of crime against him, and instituted and prosecuted false, malicious, and unfounded criminal actions against the plaintiff; that the defendants committed similar acts June 1, 1900, and at divers times thereafter during the months of June, July, and August, 1900, and again May 28, 1901; that with a similar purpose the three defendants named falsely and maliciously made complaint under the oath of one of

them against the plaintiff, and caused him to be arrested on a false and malicious charge of having made an assault upon one of them with intent to do great bodily harm, then and there being armed with a revolver, which charge, after hearing, the magistrate found to be unfounded, and so dismissed the complaint and discharged the plaintiff, and adjudged that the complainant pay the costs thereof; and prays judgment for $10,000 damages and costs. The defendant *Torrison* separately answered by way of admissions and denials, and then by way of counterclaim alleged, in effect, that *Torrison* is, and for more than eight years then last past had been, the owner in fee and in the actual and lawful possession of the four and one half acres of land therein specifically described; that May 14, 1888, one Hanson got a tax deed on the four and one half acres, and the same was recorded November 24, 1888; that immediately after the recording of such deed Hanson took open, actual, exclusive, and adverse possession under that deed of the land therein described, and continued in such possession for more than the three years next following; that thereupon Hanson conveyed the premises described in the tax deed to *Torrison,* who has ever since and until now remained in the open, actual, exclusive, and adverse possession of such premises, claiming to be the owner in fee thereof; that the plaintiff was barred from any right to the possession of the land by the three-years statute of limitations mentioned in sec. 1188, Stats. 1898, and the ten-years statute of limitations prescribed in secs. 4211, 4212, and 4215, and *Torrison* claims the benefit of those statutes. The counterclaim further alleges that May 28, 1899, the plaintiff wrongfully and unlawfully and with force and arms broke and entered the close of the defendant *Torrison* so described, and committed damage thereon, and threatened violence to *Torrison* and his servant; that *Torrison* ordered the plaintiff to depart; that *Torrison* cultivated the soil and raised crops thereon in May, June, July, and August, 1899; that such

acts of *Torrison* were the same acts referred to in the complaint; that the plaintiff repeated such wrongful and unlawful entry June 1, 1900, and at divers times before and after that date, and again May 28, 1901; that *Torrison's* four and one half acres were inaccessible to him by any public highway except the Manitowoc river; that the plaintiff's false and fraudulent claim of title to and possession of the premises, together with his numerous and long-continued trespasses, have cast a cloud upon *Torrison's* title, which *Torrison* asks to have removed by judgment establishing his title, and that the plaintiff be adjudged to be barred from any claim to the land. The plaintiff demurred to such counterclaim upon the ground that it does not state facts sufficient to constitute a counterclaim, assigning each of the six grounds of demurrer mentioned in sec. 2658, Stats. 1898.

For the appellant there was a brief by *Sedgwick, Sedgwick & Schmidt,* attorneys, and *W. H. Timlin,* of counsel, and oral argument by *Mr. Timlin.* They contended, *inter alia,* that the fact that plaintiff had been guilty of trespass upon defendant's rights is not a defense to a trespass committed by the defendant, nor is an equitable claim of the defendant to a conveyance of the land on which the trespass was alleged to have been committed any defense. *Sika v. C. & N. W. R. Co.* 21 Wis. 370; *Farnsworth v. Brunquest,* 36 Wis. 202. Mere possession is sufficient to enable plaintiff to maintain his action, and it is lawful to repel force by force in defense of one's person, habitation, or goods against an intruder who manifestly intends or endeavors, by violence or surprise, to commit a felony. *Field v. Apple River L. D. Co.* 67 Wis. 569; *Scribner v. Beach,* 4 Denio, 448. The nature of the trespass alleged in the complaint is not for injuries to the freehold, but merely for personal trespass and disturbance of plaintiff's possession. *Huppert v. Morrison,* 27 Wis. 365; *Barnes v. Martin,* 15 Wis. 240. The words "subject of action" are defined in *Bazemore v. Bridgers,* 105 N. C. 191, 10

S. E. 888. A counterclaim must be a demand, which if established, would in some way qualify or defeat the judgment to which the plaintiff would otherwise be entitled. *Dietrich v. Koch,* 35 Wis. 618. The counterclaim does not arise out of the trespass complained of, nor is it connected with the subject of the action. *Tallman v. Barnes,* 54 Wis. 181; *McLane v. Kelly,* 72 Minn. 395, 75 N. W. 601; *Mulberger v. Koenig,* 62 Wis. 558. See *Weatherby v. Meiklejohn,* 56 Wis. 73; *Moore v. Smead,* 89 Wis. 558; *Akerly v. Vilas,* 21 Wis. 88; *Davidson v. Rountree,* 69 Wis. 655; *Scheunert v. Kaehler,* 23 Wis. 523. The subject of the action is the plaintiff's primary right which has been broken and by means of whose breach a remedial right arises. Pomeroy, Remedies (2d ed.) §§ 705, 775, 776; *Chamboret v. Cagney,* 32 N. Y. Super. Ct. R. (2 Sweeny) 378; *Marks v. Tompkins,* 7 Utah, 421, 27 Pac. 6; *Schuster v. Thompson,* 6 Dak. 10, 50 N. W. 125; *Schmidt v. Bickenbach,* 29 Minn. 122, 12 N. W. 349; *Dove v. Hayden,* 5 Oreg. 501; Bliss, Code Pleading, §§ 60, 386, 389; Phillips, Code Pleading, §§ 251, 252.

For the respondents there was a brief by *L. J. Nash,* attorney, and *O. M. Torrison,* of counsel, and oral argument by *Mr. Nash.* They contended, *inter alia,* that the counterclaim was one in favor of a defendant and against a plaintiff between whom a several judgment may be had in the action. *Bank of New London v. Ketchum,* 66 Wis. 428; *Boyd v. Beaudin,* 54 Wis. 193; *Jarvis v. Peck,* 19 Wis. 74; *Thompson v. Kessel,* 30 N. Y. 383; *Clegg v. Am. N. U.* 60 How. Pr. 498; *McIntosh v. Ensign,* 28 N. Y. 169. The counterclaim arises out of the transaction set forth in the complaint as the foundation of plaintiff's claim. *Gutzman v. Clancy,* 114 Wis. 589; *Pelton v. Powell,* 96 Wis. 473; *Collins v. Morrison,* 91 Wis. 324; *Jones v. Burtis,* 88 Wis. 478; *Gilbert v. Loberg,* 86 Wis. 661; *Scott v. Menasha,* 84 Wis. 73; *Wilson v. Hooser,* 76 Wis. 387; *Grignon v. Black,* 76 Wis. 674; *Scheunert v. Kaehler,* 23 Wis. 523; *Jarvis v. Peck,* 19 Wis. 74; *Ainsworth*

*v. Bowen,* 9 Wis. 348; *Carpenter v. Manhattan L. Ins. Co.* 22 Hun, 49; *S. C.* 93 N. Y. 552; *Thompson v. Kessel,* 30 N. Y. 383; *Xenia Branch Bank v. Lee,* 7 Abb. Pr. 372. The counterclaim states a cause of action connected with the subject of the action. *G. & H. Mfg. Co. v. Hall,* 61 N. Y. 226, 237; *Carpenter v. Manhattan L. Ins. Co.* 93 N. Y. 552, 556; *Northern Trust Co. v. Snyder,* 113 Wis. 516, 527; *Thompson v. Kessel,* 30 N. Y. 383; *Xenia Branch Bank v. Lee,* 7 Abb. Pr. 372; *O'Brien v. Garniss,* 25 Hun, 446. The demurrer admits *Torrison's* possession just as he alleged it in his counterclaim, and it follows, therefore, that he could at no time since such possession began bring ejectment and try the title at law. It also follows that during the many years of *Torrison's* admitted possession *Stolze* has been at full liberty to bring his action of ejectment. *Grignon v. Black,* 76 Wis. 674; *Jarvis v. Peck,* 19 Wis. 74; *Carmichael v. Argard,* 52 Wis. 607. If a counterclaim, when sustained, will defeat plaintiff's cause of action in whole or in part it is not defective because it also seeks to obtain further and affirmative relief. *Scott v. Menasha,* 84 Wis. 73; *Holland v. Challen,* 110 U. S. 15. The counterclaim satisfies the requirement that such a pleading must, if sustained by proof, defeat in whole or in part or qualify the judgment which plaintiff would otherwise be entitled to recover. *Scott v. Menasha,* 84 Wis. 73; *Wilson v. Hooser,* 76 Wis. 387; *Grignon v. Black,* 76 Wis. 674; *Heckman v. Swartz,* 55 Wis. 173; *Dietrich v. Koch,* 35 Wis. 618; *Jarvis v. Peck,* 19 Wis. 74.

CASSODAY, C. J. The demurrer of the plaintiff to the counterclaim alleged in the separate answer of the defendant *Torrison* assigns all the six grounds mentioned in sec. 2658, Stats. 1898, but the plaintiff only relies upon the last, which is that "the cause of action stated [in the counterclaim] is not pleadable as a counterclaim to the action." Whether it is or not is the important question to be considered on this ap-

peal. As stated by counsel for the defendant, the statute provides that, in addition to denials, the answer may contain "a statement of any new matter constituting a defense or counterclaim." Sec. 2655, Stats. 1898. We are not here called upon to consider any new matter not constituting a counterclaim, even though it might in whole or in part constitute a defense. *Weatherby v. Meiklejohn,* 56 Wis. 73, 13 N. W. 697. As indicated, we are here only concerned as to whether the facts alleged in the answer are pleadable as a counterclaim. That depends upon the meaning of the statute, which declares:

"The counterclaim . . . must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action and arising out of . . . (1) a cause of action arising out of the contract *or transaction* set forth in the complaint as the foundation of the plaintiff's claim *or connected* with the subject of the action." Sec. 2656, Stats. 1898.

It is conceded that the other provisions of the section have no application to the case. Counsel contend, in effect, that, as the action is against the defendants as tort feasors, a judgment might be taken in favor of the plaintiff and against any one of the defendants; and hence that the counterclaim in favor of *Torrison* is one existing in favor of him "and against the plaintiff between whom a several judgment might be had in the action," and to that extent satisfies the provisions of the statute quoted. For the purposes of this appeal we will assume such contention to be correct. *Ellis v. Esson,* 50 Wis. 138, 6 N. W. 518; *Pogel v. Meilke,* 60 Wis. 248, 18 N. W. 927; *Bishop v. McGillis,* 82 Wis. 120, 51 N. W. 1075.

2. It is urged that the counterclaim alleged arose out of the "transaction set forth in the complaint as the foundation of the plaintiff's claim." In support of such claim counsel cite the recent case in this court wherein it was held that the word "transaction," as used in that section, was "broad enough to include the entire, continuous, physical encounter"

between the two combatants. *Gutzman v. Clancy,* 114 Wis. 589, 593–595, 90 N. W. 1081, and cases there cited. That is an extreme case, but it does not meet the question here presented. As indicated, the "transaction set forth in the complaint as the foundation of the plaintiff's claim" was the wrongful and unlawful breaking and entering the close of which the plaintiff was at the time in the quiet and peaceable possession, and malicious prosecution and conspiracy in support of such conduct. The equitable counterclaim sought to be interposed is to establish the title of *Torrison* to the *locus in quo* under a tax deed and a subsequent conveyance and the statutes of limitation, mentioned in the foregoing statement, and to have the plaintiff's assertion of title adjudged to be unfounded. It is very obvious that such equitable counterclaim did not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim. On the contrary, it arose entirely independent and outside of that transaction, and the trespasses of the defendants alleged are sought to be justified by virtue of it. Nor is it legally "connected with the subject of the action" set forth in the complaint. It did not arise out of the torts or trespasses alleged in the complaint, nor is it legally connected with such torts or trespasses. "The subject of the oction" is not the land, nor the title to the land, but the torts alleged. *Bazemore v. Bridgers,* 105 N. C. 191, 10 S. E. 888. The peaceable possession of the plaintiff was sufficient without actual title to support trespass *vi et armis. McNarra v. C. & N. W. R. Co.* 41 Wis. 69; *Carl v. S. & F. du L. R. Co.* 46 Wis. 625, 1 N. W. 295; *Gerhard v. Swaty,* 57 Wis. 24, 14 N. W. 851; *Field v. Apple River L. D. Co.* 67 Wis. 569, 31 N. W. 17; *Moore v. C., M. & St. P. R. Co.* 78 Wis. 120, 47 N. W. 273; *Stahl v. Grover,* 80 Wis. 650, 50 N. W. 589. Besides, malicious prosecution might be maintained without such possession.

"A counterclaim must be a claim which, if established, will defeat, or in some way qualify, the judgment to which plaint-

iff is otherwise entitled." *Dietrich v. Koch,* 35 Wis. 618; *Moore v. Smead,* 89 Wis. 569, 62 N. W. 426; *Appleton Mfg. Co. v. Fox River P. Co.* 111 Wis. 469, 87 N. W. 453; *Kaukauna E. L. Co. v. Kaukauna,* 114 Wis. 343, 89 N. W. 542.

This court has held that, where the complaint stated "a cause of action in trespass *quare clausum,* with allegations of the injury, destruction, and carrying away of personal property in aggravation of damages," the defendant could not interpose "an equitable counterclaim, as owner in common with plaintiff of the personal property injured or taken, to have the plaintiff required to account for the use of defendants' share of the property, and to have the property sold, and the proceeds divided between the parties; such a claim not arising out of the trespass complained of, nor being connected with the subject of the action." *Tallman v. Barnes,* 54 Wis. 181, 11 N. W. 478. See, also, *Scheunert v. Kaehler,* 23 Wis. 523; *Mulberger v. Koenig,* 62 Wis. 558, 562–564, 22 N. W. 745. In one of these cases it was said by the late Justice TAYLOR:

"The subject of the action is nothing more or less than the facts constituting the plaintiff's cause of action. . . . A counterclaim, in order to be allowed as such, under this last clause of the statute, must be connected with the facts constituting the plaintiff's cause of action." *Mulberger v. Koenig, supra.*

This court has recently held:

"In an action of ejectment neither the running of the statute of limitations nor facts constituting an estoppel *in pais* can properly be pleaded as a counterclaim, . . . each being available as a legal defense." *Appleton Mfg. Co. v. Fox River P. Co.* 111 Wis. 465, 87 N. W. 453.

Numerous cases are cited by the respective counsel, as will be observed by consulting their briefs. While these cases have more or less bearing upon the question presented, yet, after all, the case necessarily turns upon the wording of the statute, which is plain. Whatever cause of action *Torrison*

may have against the plaintiff, yet the one alleged, if established, would in no way qualify or defeat the judgment to which the plaintiff might otherwise be entitled.

*By the Court.*—The order of the circuit court is reversed, and the cause is remanded, with direction to sustain the demurrer to the counterclaim, and for further proceedings according to law.

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REVOLINSKI, by guardian *ad litem,* Respondent, vs. ADAMS COAL COMPANY, Appellant.

*May 15—May 29, 1903.*

*Master and servant: Injury to employee: Negligence: Evidence: Contributory negligence: Assumption of risk: Excessive damages.*

1. In an action by a servant for injuries sustained while attempting to ungrip a coal car from the cable propelling the car, it was alleged in the complaint and established by the evidence, among other things, that the cable, composed of a number of small wires, was worn out, many of the wires broken and projecting, and that this was the cause of the failure of the grip to work. *Held,* that evidence of former occurrences of a similar nature within two or three months prior to the accident was admissible, and was not rendered incompetent because it was shown that after such occurrence the cable had been repaired, or that thereby issues were raised not formed by the pleadings.
2. In such action, evidence that the arc lights with which the place of the accident was lighted were sometimes obscured by coal dust from the operation of defendant's machinery, is admissible on the question of whether plaintiff was negligent in not discovering the condition of the cable, although there was no claim that the place where plaintiff was working was defectively lighted.
3. In order to sustain, as matter of law, the claim that an employee, injured in the discharge of his duties, was guilty of contributory negligence, or had assumed the risk, the evidence on which such claim is based must be uncontradicted, or so clearly proven that no reasonable inference can be drawn to the contrary.

4. A servant, eighteen years of age, was injured by having his skull fractured, resulting in injuries to the eyes and brain. There was expert evidence that the injuries were permanent in their nature. *Held*, that a verdict of $4,100 was not excessive.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries. The defendant is a foreign corporation operating an extensive coal dock and yard in Manitowoc. On the night of October 18, 1899, the plaintiff, then being eighteen years of age, was seriously injured while operating a small grip car in the defendant's yards. The plaintiff had worked for the defendant in its yard for about a year and a half before the night of the accident, but his work had been that of a laborer shoveling coal into cars on the ground floor of the yards. It appeared that there was in the defendant's yards a large trestle or platform, some twenty feet above the ground, upon which men worked, and where coal was received from vessels into hoppers, from which it was emptied into small grip cars which ran upon a tramway, and were propelled by an endless cable, about three-quarters of an inch in diameter, made of steel wire, and about half a mile long, which was running continuously between the rails upon which the cars ran. This part of the defendant's premises was called by the men "upstairs." The plaintiff had never worked upstairs in the yard, but upon the night in question was asked by the foreman, Adler, if he did not want to work upstairs. He at first made some objections, on account of inexperience with the machinery, but finally consented. When he commenced to work that evening he was told to fill cars from hopper No. 1, and send them forward to the scales, about 100 feet distant, to be weighed. This duty involved opening the hopper and letting the coal therein run out into the tram car, and, when the tram car was full, pulling up the endless cable with a hook a few inches into the grip which extended down from the front of

the tram car, which grip was operated by a lever handle extending out from the tram car beyond the side of the car. When this lever was lifted up, the grip was opened, and the cable dropped; but, when the lever was pressed down, the grip was closed, and the car propelled with greater or less speed, according as to whether the grip was tightly closed, or only partially closed, so as to allow the rope to slide through without moving the car at the same rate at which it was going. There was some dispute as to how much instruction with regard to his duties was given to the plaintiff, but it is agreed that he was told that he must not let the cars bump into each other. It appears that there was a rope hanging nearby the place where the plaintiff was at work, which could be pulled if it was necessary to stop the cable, but that he was not told of this. His duty, after the grip car was full, was to grip it onto the cable and send it forward to the scales, where it was to be weighed; ungripping it at a sufficient distance before reaching the scales so that the momentum would carry it to the scales. He did his work successfully for several hours, when he met with the accident in question. His own testimony tended to show that at the time of the accident, having loaded a car, he gripped it onto the cable for the purpose of sending it forward to the scales, and was walking by the side of the car, ready to ungrip it at the proper point so that its momentum would carry it to the scales; that when he reached a point about thirty feet from the scales he attempted to ungrip the car, there being another car immediately ahead of him, and about twenty-five feet distant, and a fellow workman in front of that car; that, when he attempted to ungrip the cable by pulling up the lever, the cable did not drop, but, on the contrary, the car started faster; that the plaintiff then became excited, fearing a collision, and attempted to dislodge the cable from the grip with the hook in his hand, leaning forward for the purpose, and while so engaged he did not notice the rapidity with which his car was approaching the

car ahead, and while he was still trying to ungrip his own car his head was caught between the two cars, and his skull was fractured, and he was otherwise severely injured. The jury returned a special verdict by which they found (1) that the plaintiff was injured at the time and in the manner stated; (2) that at the time of his injury he properly opened the grip by means of the lever; (3) that the cable was in such a defective condition that broken wires or strands therein stuck in the grip and prevented it from dropping when the plaintiff opened the grip; (4) that the plaintiff had no knowledge or experience in the work before the night on which he was injured; (5) that the defendant did not give the plaintiff any instructions as to the operation of the cars, or the dangers therefrom; (6) that the defendant knew, through its foreman, that the plaintiff was a minor, and also knew the extent of his knowledge and experience in the work; (7) that ordinary care required that the defendant should have instructed the plaintiff as to the operation of the cars, and the dangers therefrom; (8) that, under the circumstances, and considering the plaintiff's age and experience, the danger of attempting to detach the cable from the grip in the manner which the plaintiff adopted, was not open or obvious to the plaintiff; (9) that the defendant knew of the defective condition of the cable in time to have removed the same before the plaintiff was injured; (10) that the plaintiff did not know of such defective condition, nor by the exercise of ordinary care should he have known thereof; (11) that plaintiff did not know that the defective condition of the cable sometimes prevented it from dropping down from the grip when opened by the lever, nor should he have known that fact by the exercise of ordinary care; (12) that the defective condition of the cable made the operation of the cars more unsafe than it would have been, had such defect not existed; (13) that defendant's neglect to remedy the defect in the cable was the proximate cause of plaintiff's injury; (14) that

plaintiff was not guilty of contributory negligence; (15) that his damages were $4,100. The defendant moved to correct the special verdict by changing certain answers, and also to set aside the verdict and for a new trial, both of which motions were overruled. Judgment was entered for the damages found upon the verdict, and the defendant appeals.

For the appellant there was a brief by *Phillips & Hicks,* and oral argument by *M. C. Phillips* and *N. P. Christensen.*

For the respondent there was a brief by *O'Connor, Schmitz & Wild* and *Schmitz & Burke,* and oral argument by *A. J. Schmitz.*

WINSLOW, J. The verdict in this case, though unnecessarily long and involved, tells a very plain story of injury resulting from actionable negligence. Examination of the evidence shows that all the findings are sufficiently supported by the evidence. Indeed, it is rare to find a case of this nature where the fact of the employer's negligence is as satisfactorily proven as in the present case. There is ample evidence to show that the endless steel cable which furnished the motive power to the cars had been for some weeks before the accident in a defective condition; that it had been patched in a number of places; and that the ends of the strands, each composed of a number of smaller wires, frequently got loose and frayed out so that they would catch in the grips, causing the very difficulty which seems to have occurred here. It is said that the evidence of these former occurrences of a similar nature within two or three months prior to the accident was incompetent, because it is shown that after each such occurrence the rope was repaired, and that issues are raised not formed by the pleadings. It is a little difficult to see upon what theory these claims of error are based. The complaint charges that the rope was worn out, and many of the wires broken and projecting, and that this was the cause of the failure of the grip to work, and we do not see how the fact could be more

satisfactorily shown than by just such testimony as was introduced. It seems to be the best evidence of the fact claimed, and we can entertain no doubt of its admissibility.

Certain evidence was admitted, tending to show that the arc lights with which the shed was lighted were sometimes obscured by coal dust from the operation of the hoppers, and would occasionally die down, and then flare up again. This is said to have been inadmissible, because there was no claim that the place was defectively lighted. It appears, however, that it was received only for the purpose of showing the conditions and surroundings at the time, and as tending to show whether the plaintiff was negligent in not discovering the condition of the cable, and for that purpose it was undoubtedly competent. *Kucera v. Merrill L. Co.* 91 Wis. 637, 65 N. W. 374.

The general claim is made that, as matter of law, the evidence shows that the plaintiff was guilty of contributory negligence, and assumed the risk. This claim is largely based upon evidence which is directly contradicted either by the plaintiff or other witnesses, or both. In order to sustain such a claim, the evidence on which it is based must be undisputed, or so clearly proven that no reasonable inference can be drawn to the contrary, and this is far from being the case here.

The claim that there was no proof of negligence on the part of the defendant is equally untenable, and for substantially the same reasons.

It is also claimed that the damages are excessive. Upon the whole case, we cannot say that we should be justified in holding the damages excessive. The injury was very serious. The plaintiff's skull was fractured, resulting in injuries to the eyes and brain, and there is expert evidence that the injuries are permanent in their nature.

*By the Court.*—Judgment affirmed.

BAUMANN, Respondent, vs. C. REISS COAL COMPANY, Appellant.

*May 15—May 29, 1903.*

*Master and servant: Personal injuries: Negligence: Proximate cause: Unsafe place to work: Evidence: Appeal and error: Framing special verdict: Fellow-servant: Vice-principal: Instructions to jury: Damages.*

1. Plaintiff, while at work at defendant's coal dock assisting in removing coal from under a trestle, was injured by the falling of the structure under the following circumstances. A large piece of coal incrusted by ice, on being loosened by a fellow-workman, rolled against one of the posts supporting the trestle, causing it to move out of place at the top, and the structure thereupon fell. Shortly before there had been a fire which had so destroyed the top of the post that the cap no longer held it in place, and defendant's foreman had, before the accident, examined the trestle and must have seen the damaged condition of the post in question. *Held*, that the jury were warranted in finding that the defendant, through its proper representative, knew, before the accident, that plaintiff's working place was unsafe.
2. It is not error for the trial court to so frame a special verdict as to cover all the facts vital to the cause of action and defense, whether controverted on the evidence or not, and, if the result is to inform the jury how particular questions must be answered to enable plaintiff to recover, that is the result of the law, not the abuse of it.
3. In an action for injuries sustained by a servant while shoveling coal, caused by the fall of a trestle, the evidence showed that the defendant's foreman, who had examined the trestle after a fire two weeks previous to the accident, had full charge of the work; that defendant had left to him the duty of providing a safe working place for the men, and that he was not personally engaged with them in removing coal. *Held*, that the foreman was a vice-principal in respect to the safety of the trestle, and all other matters affecting the character of the working place in which he placed plaintiff.
4. In such case, it appeared, and was so found by the jury, that while the immediate cause of the fall of the trestle was the rolling of a large body of coal against it, yet such an occurrence was one to be reasonably expected under the circumstances,

and that it would not have injured the trestle had the effects of the fire been repaired. *Held*, that the jury were warranted in finding that the negligence of the foreman in not acquainting the plaintiff with the fact that the trestle was not secure, or otherwise remedying the danger, was the proximate cause of the accident.

5. In an action by a servant, working on a coal dock, for injuries caused by the falling of a trestle, it appeared, among other things, that a fire having weakened the top of one of the supporting posts, a large block of coal loosened by a fellow-workman rolled against the post, knocking it down, and thereby causing the trestle to fall. The court submitted to the jury the question: Was the defective condition of the trestle the proximate cause of the accident? On such question the court instructed the jury, in substance, that an affirmative answer required them to first find that the plaintiff's working place, to the knowledge of defendant, was unsafe for a sufficient length of time before the accident to have enabled defendant to have protected him therefrom by the exercise of ordinary care; that the fall of the trestle was the natural and probable consequence of such unsafe condition, and that the consequent injury to some one of defendant's servants, in the light of attending circumstances, was an event which, in the exercise of ordinary care, by one circumstanced as defendant, was reasonably to be apprehended. The jury found all such essentials of responsible causation. *Held*, that it was not necessary for the jury to answer other questions as to whether some act of a fellow-servant, or some other circumstance, was the producing cause of the injury.

6. A servant was injured about his neck, back, and head. There was evidence of circumstances indicating that he was rather weak-minded before the injury; that his condition was worse to a considerable degree thereafter, opinion evidence that he suffered considerable mental impairment as the result of his injuries, and that such condition was progressive in character. *Held*, that it could not be said, as a matter of law, that the jury were not warranted in assessing damages upon the theory that plaintiff's mind was injured by the negligence complained of.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover damages for a personal injury. January 19, 1901, plaintiff, a laborer twenty-six years of age, while working for defendant upon its coal dock, assisting in the re-

moval of coal from under a trestle that had been weakened by fire, was injured by the structure falling, one of the timbers striking him, breaking his right arm, bruising one of his feet and other parts of his body, particularly his head, the latter injury causing some mental impairment. Plaintiff's claim was that the defendant knew that the trestle was unsafe and permitted plaintiff, without warning him of the danger, to work in the vicinity thereof, where he was liable to be injured by the trestle falling, and that he pursued his employment with due care up to the time the injury occurred. Defendant's claim was that the trestle was not dangerous; that no conditions were known to it or reasonably chargeable as within its knowledge, rendering the trestle unsafe before it fell, and that the accident was caused by the negligence of plaintiff and his fellow-servants in that they loosened a large lump of coal from the top of the coal pile, which was under the track of the trestle and around the supports thereof, causing the same to roll down and strike one of the supports near where they were working, by reason whereof the trestle fell and plaintiff was injurd.

There was evidence undisputed or tending to prove thus: There was a fire upon the coal dock which commenced December 31st and lasted some time. There was a long coal shed on the dock, in which was stored the stock of hard coal. Such shed was totally destroyed. In the open yard was a trestle from the top of which soft coal was dumped upon the surface of the dock, and such trestle was so injured that a portion of it had to be taken down. The trestle was some over sixteen feet high, made of ten by ten posts set about twenty feet apart both ways, with cross-timber caps and two lines of three by ten inch plank placed on edge parallel with each other at right angles with the caps, the planks being fastened together, forming the bed of the tram track on which coal cars were conveyed to the point where it was desired to dump coal upon the dock. On the day of the injury plaintiff

and others were at work removing coal from the pile near the point up to which the trestle had been removed. The top timber of the section of the structure where the work was in progress was heavily loaded with ice, and had been for some days, caused by water being thrown thereon at the time of the fire and freezing. The caps on top of the posts of the trestle were fastened by spikes. They were not mortised to the posts. The construction was such that if the top of a post became burned, causing the spikes to loosen their hold upon the cap, a heavy chunk of coal rolling down from the top of the coal pile against such post was liable to displace it, allowing the superstructure to fall. Some time before the accident defendant's foreman examined those parts of the trestle claimed upon the trial to have been weakened by fire so as to render it dangerous. He had full opportunity to see all the defects that existed. He was the person relied upon by the defendant to look after the safety of the working place of the men. The top of the post near where plaintiff was working was partly destroyed by fire. The destruction was such that the cap no longer held it firmly in place. It was no part of plaintiff's business to observe that. The foreman was relied upon to look after such matters. The timbers were so discolored by fire and so covered with ice that the condition of the top of the post which gave way could not readily be seen from the place where the plaintiff was working when the trestle fell. Some days before the accident he had assisted in removing that part of the trestle that was taken down.

The evidence tended to show that the immediate circumstances of the accident were these: One of plaintiff's associates, by direction of the foreman or in the performance of his regular duties, loosened a large piece of coal and ice from a point near the top of the pile. It rolled down, striking the trestle post which was damaged by fire, whereupon it moved out of place at the top, allowing the superstructure to fall. As it fell plaintiff was struck by one of the timbers, break-

ing the radius of his right arm, inflicting three scalp wounds on his head, injuring somewhat one of his ankles, and injuring, to some extent, his neck and back. He was treated for his injuries in a hospital for a period of three weeks, subsequent to the accident. There were indications of some considerable injury to the brain as a result of the direct injury to the neck, back, head and nervous system. There was no discoverable fracture of the skull.

The cause was submitted to the jury for special verdict. They found, in effect, that at the time of the accident the trestle was unsafe to the knowledge of defendant's foreman, Roth; that such condition was the sole proximate cause of the accident, and that plaintiff's damages were $4,208.33. Judgment was rendered in his favor accordingly.

For the appellant there was a brief by *Phillips & Hicks,* and oral argument by *M. C. Phillips* and *N. P. Christiansen.*

For the respondent there was a brief by *C. A. Dean,* attorney, and *Simon Gillen,* of counsel, and oral argument by *Mr. Gillen.*

MARSHALL, J. The jury found that the defendant, through its proper representative, knew before the accident that plaintiff's working place was unsafe. Appellant's counsel contend that there is no warrant in the evidence for such finding. It seems to us otherwise. There was considerable evidence tending to show that there was a weakened condition of the trestle, causing it to give way when the rolling body of coal struck the post, in that such post had been so destroyed by fire at the top that the cap no longer held it firmly in place, and that the foreman, Roth, made such an examination of the structure before the accident that he must have seen such damaged condition. He testified, substantially, that he examined the post where it parted from the cap. The jury went upon the theory that since he did so he must have seen all that was obvious, and that the defect referred to was of that character.

Complaint is made because the court in framing the special verdict included a number of questions covering undisputed matters and directed the proper answers, and in other ways indicated what answers were necessary to certain questions to enable plaintiff to recover. It has not yet been held error for a trial court to include in a special verdict undisputed matters, and direct answers to be made, or not to frame the verdict so as to disguise the effect of particular questions upon the final result. Doutbless the court may so frame a special verdict as to cover all the facts vital to the cause of action and defense, if it sees fit, whether controverted on the evidence or not. If the result is to inform the jury how particular questions must be answered to enable a plaintiff to recover, that is the result of the law, not the abuse of it. True, this court has often advised that the manner of framing the verdict, best calculated to carry out the spirit of the statute, is to include in it only such questions as will, when answered, in view of the undisputed matters, enable the court to apply the law to the case. That has been iterated and reiterated so many times that we cannot hope to add to the importance of it by repeating it again. This case probably might have been submitted to the jury with five or six questions instead of nineteen, yet we cannot see that any reversible error was committed. The verdict, on the whole, follows the line suggested by this court much more closely than many that often come up for review.

It is said that the verdict does not support the judgment, because it does not pass upon the question of whether Roth was a fellow-servant. If the court had added to the verdict a question on that, it would only have increased by one the at least useless interrogatories respecting undisputed matters. The evidence is all one way that Roth had full charge of the work upon the dock, that defendant left to him the duty of proving a safe working place for the men, and that he was not personally engaged with them in removing the coal. That

made him in every sense a vice-principal in respect to the safety of the trestle, and all other matters affecting the character of the working place in which he placed respondent and his associates.

The most important contention advanced by appellant's counsel, as said after presenting the matters to which we have referred, is that no actionable negligence was shown by the evidence. That, however, seems to have been decided in favor of respondent by the conclusions that appellant, by its proper representative, knew that respondent's working place was unsafe before the accident, since there is no claim that respondent knew that fact or was chargeable with knowledge thereof under the circumstances, and the jury found that the condition of the trestle was the proximate cause of the accident. In the discussion of this contention appellant's counsel again introduce the claim that Roth was a fellow-servant, and that his negligence was not imputable to appellant. On that *Wiskie v. Montello G. Co.* 111 Wis. 443, 87 N. W. 461, and *Schultz v. C., M. & St. P. R. Co.* 116 Wis. 31, 92 N. W. 377, are referred to. We are unable to see that either case is in point. It has often been held that whether one employee is the fellow-servant of another does not depend upon the grade, but does upon the character of the service the two are engaged in. *Dwyer v. Am. Exp. Co.* 82 Wis. 307, 52 N. W. 304; *Hartford v. N. P. R. Co.* 91 Wis. 374, 64 N. W. 1033; *Adams v. Snow,* 106 Wis. 152, 81 N. W. 983. When a foreman is engaged with other employees in personally doing any particular act, as that of blasting, the situation in *Wiskie v. Montello G. Co.,* all are fellow-servants. This is not a case where a crew, consisting of a foreman and those under his charge, were at work to accomplish a common object, as in the case relied upon by counsel, but one where a crew of men were set at work by the master, in the person of his foreman, in a dangerous place. Roth, as before indicated, took no part in moving the coal, but represented the master respecting the working place of the men who performed that service. The

distinction between where a foreman is a fellow-servant and where he stands in the place of the master is too familiar, it seems, to warrant discussing it at length. The case cited by appellant's counsel is a good example of the former, while *McMahon v. Ida M. Co.* 95 Wis. 308, 70 N. W. 478, is a good example of the latter. *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934, is an example of how a foreman may act in the capacity of a vice-principal in placing another under him at work, and become a mere fellow-servant of such other in respect to such work by engaging with him in the performance thereof. In this case Roth stood for the principal in putting the men to work. The duty as regards the safety of the working place was personal with the master. Roth's neglect in regard thereto was therefore appellant's neglect.

On the branch of the case above discussed it is argued that other causes than a defect in the trestle may, by the evidence, have been the cause of the accident as likely as that. We cannot sanction that such appears to have been the situation as a matter of law. True, the immediate cause of the fall of the trestle was the rolling of a large body of coal against the post, but it fairly appears that such an occurrence was one to be reasonably expected under the circumstances, and that it would not have injured the trestle had the post been fastened firmly to the cap, and the jury in effect so found. In that state of the case the jury were warranted in finding that the negligence of the foreman in not acquainting the men with the fact that the post was not so fastened, or otherwise remedying the danger, was the proximate cause of the accident.

Further complaint is made because the court directed the jury, in case they found that the weakened condition of the trestle was the proximate cause of the accident, not to answer the question, as regards whether the act which started the body of coal down the sloping side of the coal pile was such proximate cause. The conclusive answer to that is that an

affirmative answer to the question as to whether the defective condition of the trestle was the proximate cause of the accident, in connection with the instructions in respect thereto, negatives any other circumstance being such cause, as a detailed statement of the situation will show. If it be true, as claimed, that the instructions as to the unanswered question were not strictly correct, we are unable to see how appellant was prejudiced. This was the situation: No complaint was made of the instructions respecting the question which was answered. Such instructions gave the jury to understand that an affirmative answer required them to first find that the plaintiff's working place, to the knowledge of appellant, was unsafe for a sufficient length of time before the accident to have enabled it to protect him therefrom by the exercise of ordinary care; that the fall of the trestle was the natural and probable consequence of such unsafe condition; that the probability of the fall of the trestle, with the consequent injury to some one of its employees, in the light of attending circumstances, was an event which, in the exercise of ordinary care by one circumstanced as appellant was, was reasonably to be apprehended. It is easily seen that when the jury found all those essentials of responsible causation, the whole subject in that regard was covered, leaving no need to answer any interrogatory as to whether some act of a fellow-servant, or some other circumstance, was the producing cause of the injury. All of such other circumstances that might have had a bearing, probably or possibly, in view of the evidence, upon the cause of the injury, were negatived by the affirmative finding charging to appellant's negligence, in effect, the sole responsibility therefor.

Complaint is made of the size of the verdict. That is based on the theory that there is no evidence warranting a reasonable belief that respondent suffered any considerable mental impairment as a result of the accident. There was very fair opinion evidence on that subject, and evidence of circum-

stances indicating that respondent was rather weak-minded before the injury; that his condition in that regard was worse to a considerable degree thereafter, and that such condition had been noticeably progressive in character since the accident. The evidence was not strong, to be sure, but it was undisputed, that respondent did receive quite serious injuries in the region of his neck, back and head,—injuries which were calculated to produce mental impairment. That, with the opinion evidence that such impairment was produced, and the evidence in respect to respondent's actions, indicating the same to some degree, even to the mind of a nonexpert, prevents us from holding as a matter of law that the jury were not warranted in assessing damages upon the theory that respondent's mind was injured by the negligence complained of.

What we have said covers all the questions presented deemed worthy of special mention. The case on its facts is very much like *Nix v. C. Reiss Coal Co.* 114 Wis. 493, 90 N. W. 437, which grew out of the same accident. The evidence here seems to be stronger than in the previous case. It is particularly stronger in respect to the situation of the post which was struck by the rolling lump of coal, after the accident. Substantially every question now presented was presented before and was decided then against appellant. It seems that this case might well have been, under the circumstances, decided by referring to the previous adjudication, with the statement that no good reason was shown by the new record for making any different decision than before, though we have seen fit to briefly discuss the matters presented, somewhat out of regard for the belief of the learned counsel who presented the case for consideration, that the evidence in the present record differs sufficiently from the evidence produced on the former trial to warrant a careful reconsideration of the points involved.

*By the Court.*—The judgment is affirmed.

FOND DU LAC LAND COMPANY, Respondent, vs. MEIKLEJOHN, imp., Appellant.

*May 15—May 29, 1903.*

*Deeds: Mutual mistake in description: Cancellation: Quieting title: Purchaser with notice.*

Land, already fenced, was conveyed to S. and B., but the description, by mutual mistake, failed to include a certain strip. Thereafter B. conveyed by the same description to S., who directed a surveyor to plat the same. The plat was made according to the descriptions in the deeds, after which S. conveyed the property, exclusive of the strip but intending to include it, to plaintiff. Thereafter defendant discovered that the strip was not included in these deeds, and induced the original grantee to convey the strip to S. and B., and purchased the strip from S. and B., being notified by S. that he must take it at the peril of any rights of plaintiff. Thereafter S. and B. quitclaimed to plaintiff, who brought action against defendant to reform the prior conveyances and compel cancellation of defendant's deed. *Held*, that defendant was not an innocent purchaser, but took with notice of the mutual mistake, and plaintiff was therefore entitled to complete cancellation of any claim or right in defendant.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

On and prior to September 16, 1899, one Prefontaine was in ownership and occupation of a farm inclosed by a substantial fence, containing about thirty-nine and one half acres of land, which consisted of the southeast quarter of the southeast quarter of section 32, except about four acres out of the northeast corner thereof, and also of a strip about 109 feet wide across the east side of the southwest quarter of the southeast quarter of the same section. That particular parcel was the result of several prior conveyances of parcels of the two government forties mentioned, which rendered the location of the west line somewhat confused upon an abstract. In the year mentioned Prefontaine sold that farm to the de-

fendants Hattie B. Sackett and Timothy Brennan, and made conveyance thereof by a deed, which, through mutual mistake of all parties, failed to include the 109-foot strip in the southwest of the southeast, the description adopted being all of the southeast quarter of the southeast quarter, except a triangular piece north and east of the highway across the northeast corner thereof. Thereafter, on the 29th day of October, 1899, Brennan quitclaimed to Mrs. Sackett his interest in said farm by a deed following the former in description, and by mutual mistake supposed to convey the whole. Shortly thereafter Mrs. Sackett caused to be made a plat known as "H. B. Sackett's Addition to North Fond du Lac," directing the surveyors to make a plat according to her deed. They acted accordingly, taking as the western boundary of the plat the one-eighth section line between the two government forties above mentioned. A few lots were thereafter sold according to this plat, and in May, 1900, Mrs. Sackett, acting through her husband as agent, negotiated a sale of the tract to the plaintiff, the agreement being to sell to the plaintiff for what the premises had cost her, namely, the price paid Prefontaine, together with subsequent expenses incurred, less the price of whatever lots had been sold. A land contract was entered into for the sale of the land described "as H. B. Sackett's Addition to North Fond du Lac, excepting [certain previously sold lots]." Later, on May 8, 1900, conveyance was made by warranty deed, the description adopted being, "The southeast quarter (¼) of the southeast quarter (¼) of section thirty-two (32), . . . except a triangular piece of land lying north and east of highway, containing thirty-nine and one half acres, more or less, it being the intention to convey all the land shown in plat H. B. Sackett's Addition to North Fond du Lac, except [specified lots]." On the occasion of each of these conveyances possession was immediately transferred of the entire premises inclosed by the fence. About a year thereafter the plaintiff, upon attempting to grade streets

under the plat, discovered the discrepancy between the westerly line of the plat and the fence bounding the farm on the west and inquired of Dr. Sackett with reference thereto, who professed ignorance on the subject, saying that he supposed the surveyors had platted the entire tract. He, however, consulted with the appellant, *Meiklejohn,* who employed counsel to search the title, and who discovered that the farm purchased and owned by Prefontaine was not bounded on the west by the one-eighth section line, but by a line approximately as marked by the fence. He therefore, with full knowledge of the claims of the plaintiff, induced Prefontaine and wife to execute a quitclaim deed to Brennan and Mrs. Sackett of this 109 feet, representing to him that Mrs. Sackett, having bought the land from him (Prefontaine), and sold it to the plaintiff, had got to make the title good. Prefontaine's deed was executed without any new or additional consideration, but in recognition of the fact that his former conveyance was intended to carry all land westward to the fence. Thereupon *Meiklejohn* purchased the tract by quitclaim deeds from Mrs. Sackett and Brennan, being notified by the former that he must take it at his peril as to any rights of the plaintiff. The plaintiff thereupon brought this action, seeking reformation of the deeds from Prefontaine and Brennan to Sackett and from Sackett to itself, alleging them all to have been made upon the mutual mistake that the description adopted in the conveyances properly described the land inclosed within the fences; also praying that the conveyances from Brennan and Sackett to *Meiklejohn* be declared null and void, or he be declared a trustee, and required to convey to the plaintiff; also asking for general relief. The court found the fact of mutual mistake in all these conveyances, and that all parties at all times intended to convey the defined and designated tract of land, and adopted the description contained in the deeds upon the mutually mistaken supposition that thereby was correctly described that tract; also

that *Meiklejohn,* while guilty of no fraud, was not an innocent purchaser, but took with full notice, as also did Brennan at the time of the execution of the quitclaim deed from Prefontaine. It was also found that upon the commencement of this action Sackett had tendered back to *Meiklejohn* the consideration paid by him to her for the strip and demanded a cancellation of her deed. Pending the action both *Sackett* and Brennan executed to the plaintiff quitclaim deeds of the disputed strip. The court, upon this finding, entered judgment that the deeds from Sackett and Brennan to *Meiklejohn* are, and from their date have been, void and of no effect, as conveyances of the land involved, and that the plaintiff's title be confirmed and quieted as against all parties to this action. From this judgment the defendant *Meiklejohn* appeals.

For the appellant there was a brief by *Williams, Griswold & Chadbourne,* and oral argument by *W. E. Griswold* and *F. W. Chadbourne.*

For the respondent there was a brief by *Giffin & Sutherland,* and oral argument by *D. D. Sutherland.*

Dodge, J. The most vital facts, as found by the court, are that both parties, in making the conveyance beween them, mistakenly supposed that the surveyors had included in the plat of Sackett's addition all the ascertained and fenced tract of land, comprising thirty-nine and one half acres, purchased by Mrs. Sackett from Prefontaine, and upon that supposition treated, contracted, and finally made and received conveyance; that they both understood and supposed the description used in the deed correctly defined that particular body of land so fenced, and intended that the same should be thereby conveyed. After a careful examination of the evidence, we have no doubt that such findings are fully supported by it, notwithstanding the repeated assertion of Dr. Sackett that he only intended to sell what was in the plat. There are numerous circumstances, as well as his own state-

ments on cross-examination, which make plain that such assertions were made by him only in such sense as to make them entirely consistent with an intent to convey the whole tract. No good purpose can be served by a discussion of the evidence in detail, nor would such course be proper, inasmuch as the duty is not on us to consider it from an original point of view, but merely to ascertain whether the trial court's finding is so grossly in outrage of a clear preponderance, on any reasonable theory of the credence or weight to be given the testimony of any witness or other evidence, that we can account for it only on the theory of mistake, or some misapplication of rules of law.

The mutual mistake thus found to have existed, and to have been responsible for the fact that plaintiff failed to obtain title to this disputed strip of land for which it has paid the consideration to the owner, is, of course, a sufficient ground to warrant a court of equity to consider as done that which ought to have been done, and to so far correct and reform the writing and records as to make them truly evidence the actual transaction. This, we are satisfied, the decree does effectively. The conveyances now of record from Prefontaine, Brennan, and Mr. and Mrs. Sackett make complete chain of title to plaintiff of the disputed strip but for the ostensible title vested in appellant, *Meiklejohn,* by quitclaims to him. He is found to have taken these with full notice of plaintiff's rights and equities, of which, indeed, he was chargeable by reason of its possession. He therefore could have taken no superior rights against it. Hence the complete cancellation of any claim or right in him is proper.

Some attempt is made to invoke the rule that equity will only aid the vigilant, and to found its application on the claim that the plaintiff, if vigilant, would have discovered that the surveyor's stakes set when Sackett's addition was platted did not correspond with the fenced boundaries of the tract supposed to be included therein. Examination of the

evidence, however, discloses, by very obvious preponderance that such fact was not apparent upon any reasonable or ordinary inspection of the premises.

*By the Court.*—Judgment affirmed.

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CHIPPEWA RIVER LAND COMPANY, Respondent, vs. J. L. GATES LAND COMPANY, Appellant.

*February 27—June 18, 1903.*

*Tax deeds: Recording: Indexing: Evidence: Notice of tax sale: Statement of lands to be sold: Filing: Sufficiency: Proof of publication: Tax certificate fee, when may be included in face of certificate: Advertisement, when completed: "Last publication:" Affidavit of printer: Failure to file: Ejectment: Conditional judgment: Statutes.*

1. Under sec. 759, R. S. 1878 (providing that, upon receipt of any instrument, the register of deeds shall *immediately* enter the same upon the general index, "in the order of time in which it was received, the day, hour, and minute of its reception, and the same shall be considered as recorded at the time so noted"), and sec. 758 (providing that it shall be the duty of the register "to indorse upon each instrument or writing received by him for record, his certificate of the time when it was received, specifying the day, hour and minute of reception, and the volume and page where the same is recorded, which shall be evidence of such facts"); and under the presumption of the performance of official duty, nothing appearing to the contrary, a certificate indorsed on an original tax deed,—"Register's Office, Chippewa County. Received for record the 20th day of May, 1889, at 10:15 A. M., and recorded in Vol. 5 of Deeds, on page 252, W. J. Dalton, Register,"—is sufficient proof that the tax deed upon which it is indorsed was indexed in the general index as required by said sec. 759, and hence recorded.
2. Sec. 1130, R. S. 1878, requires the county treasurer on the first Monday in April in each year to make out a statement of all lands on which the taxes remain unpaid, with an accompanying notice of the sale thereof on the third Tuesday of May following, and cause such statement and notice to be published once each week for four successive weeks prior to the day of sale,

and copies thereof to be posted at least four weeks previous to the day of sale in at least four public places in the county. Sec. 1141 requires the county treasurer immediately after sale to deposit with the county clerk all affidavits, notices, and papers relating to the sale, together with a statement showing the lands sold, and to whom, and for what amount. *Held*, in the absence of a specific requirement to that effect, that it was unnecessary to file the original notice in the county clerk's office, and failure so to do is not an irregularity on which a tax deed can be avoided.

3. A notice of a tax sale stated that so much of each tract of land "in the annexed and following statement as may be necessary" will be sold, etc. Attached to the notice was a list or statement of the land to be sold. The affidavit of publication, to which was attached the notice and statement, simply stated that "the notice of which the annexed is a printed copy" was printed, etc. *Held*, that the statement having become an integral part of the notice by apt reference, the affidavit was not insufficient, but must be held to state that the entire notice, which in legal effect included the statement, was published.

4. If, as a matter of fact, lands sold for taxes are sold for twenty-five cents, for each parcel, in excess of the sum authorized by law, the sale is void. Such excess cannot be held trivial or unimportant.

5. In an action to set aside a tax deed it appeared, among other things, that the sum for which the land was sold included the sum returned by the town treasurer, with interest to the day of sale, also the sum of twenty-five cents for an advertising fee, and twenty-five cents additional, and that certificate was issued to the purchaser for the aggregate of said sums, without any additional charge for the certificate fee provided by sec. 1196, R. S. 1878. Sec. 1130, R. S. 1878, required notice of a tax sale to be published four successive weeks, and sec. 1132 required the printer, on penalty of forfeiture of all compensation, to transmit his affidavit of publication within six days after the last publication. It further appeared that the notice of sale was published five times, but that the last insertion was within the last week preceding the tax sale. *Held:*

(1) Since the notice must be published for *four* successive weeks prior to the day of sale, and, if the last four publications are to be reckoned as the legal publications, that the notice was only published three successive weeks, and a fraction over, before the day of sale, the first four publications were the only legal publications of the notice.

(2) That the printer was entitled to no fee for the publication.

(3) That the charge included in the face of the tax certificate of twenty-five cents for advertising fee was illegal, since the county could collect no such fee of the taxpayer unless it was obliged to pay it to the printer.

6. Under sec. 1140, R. S. 1878 (providing the form for tax certificates, showing that the "lands herein described" have been sold, etc.), the certificate may include any number of parcels sold to the same person.

7. Under said sec. 1140 and sec. 1196, R. S. 1878 (providing that the county treasurer shall receive a fee of twenty-five cents for each certificate of sale), if the certificate contain more than one parcel of land, the certificate fee cannot be charged against each parcel as a part of the sum for which the parcel is sold, but only for the certificate *issued.*

9. Under sec. 1132, R. S. 1878, the printer publishing notice of a tax sale must transmit his affidavit of publication of such notice to the county treasurer "within six days after the last publication thereof." *Held,* that the words "last publication" refer to the last issue of the paper in which the notice was legally published, and not to the completed period of publication.

10. Although under sec. 1140, R. S. 1878, providing the form for tax certificates, several parcels sold to the same person may be legally included in the same certificate, where separate certificates are issued to the purchaser on each parcel sold, the inclusion in the face of the certificate of the certificate fee of twenty-five cents is an immaterial irregularity, not prejudicial, and not ground for setting aside the certificate.

11. Under sec. 3087, Stats. 1898 (providing that, in ejectment, when the plaintiff is entitled to recover by reason of a defective tax deed, on which defendant relied, unless the plaintiff shall show that the premises were not liable to taxation, or that such tax had been paid, or that the land had been redeemed, the court shall order plaintiff to pay, as a condition of judgment, "*the amount for which the land was sold,*" the costs of executing the tax deed, and the amount paid by defendant for taxes subsequent to the sale, with interest at fifteen per cent.), the positive requirement must be followed, and it is therefore error not to require the whole sum for which lands were sold to be deposited in court as a condition of relief, although part of that sum is an illegal charge for advertising fees which forms grounds for holding the tax proceedings void.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Reversed.*

This is an action in ejectment to recover possession of

about 4,000 acres of land in Gates and Chippewa counties. The complaint is in statutory form, and the answer claims title in the defendant under tax deeds. Upon the trial the plaintiff introduced in evidence a large number of tax deeds as the basis of its title, to each of which deeds the objection was made that the proof of the recording was insufficient; but the objection was overruled in each case, and exception taken. The defendant thereupon offered in evidence the tax deeds upon which it relies, all of which were issued subsequently to the plaintiff's tax deeds, and the recording thereof was admitted. The plaintiff, in rebuttal, offered in evidence certain records of the tax proceedings upon which defendant's tax deeds were based, claiming that such records showed fatal defects in the proceedings. The court found that the lands in question were, and at all times had been, vacant and unoccupied, and that plaintiff was the owner of said lands, subject to the legal effect to be given to the tax deeds offered by the defendant; that the defendant's tax deeds were void for two reasons: (1) That the sum of twenty-five cents was illegally included in the amount for which each tract of land was sold; (2) that no statement and accompanying notice, as provided by sec. 1130, R. S. 1878, was ever made out by the county treasurer of Chippewa county, and deposited by him in the office of the county clerk of said county, as required by sec. 1141, R. S. 1878. Judgment for the plaintiff was directed on condition that the plaintiff pay into court, for the use of the defendant, the aggregate amount for which the lands were sold to the defendant at the various tax sales (less the sum of twenty-five cents on each parcel), together with the cost of executing and recording said deeds, the amount of subsequent taxes paid by the defendant, and interest on all such sums at the rate of fifteen per cent. per annum, and that in default of such payment the defendant have judgment in the action. Judgment being entered in accordance with these findings, the defendant appeals.

For the appellant there were briefs by *Sturdevant & Clark,* attorneys, and *T. C. Ryan,* of counsel, and oral argument by *L. M. Sturdevant.*

*D. Buchanan, Jr.,* attorney, and *W. F. Bailey,* of counsel, for the respondent.

The following opinion was filed March 21, 1903:

WINSLOW, J. The tax deeds under which the plaintiff claims title were issued prior to the defendant's tax deeds, and, if they were properly indexed and recorded, it is admitted that the statute of limitations has run in their favor. The respondent claims, however, that there was no proof that they were indexed as required by sec. 759, R. S. 1878, and hence that they cannot be held to have ever been recorded. This is the first question to be considered. A tax deed must have been properly indexed, or it is not deemed to have been recorded; and, until it is so recorded, ejectment cannot be maintained thereon. *Hewitt v. Week,* 59 Wis. 444, 18 N. W. 417; *Hiles v. Atlee,* 80 Wis. 219, 49 N. W. 816. The proof on the subject consisted simply of the introduction of the original deeds, each of which had indorsed thereon a certificate substantially as follows:

"Register's Office, Chippewa County.

"Received for record the 20th day of May, 1899, at 10:15 a. m., and recorded in Vol. 5 of Deeds, on page 252.

"W. J. DALTON,
"Register."

Is this certificate sufficient proof, in the absence of any proof to the contrary, that the tax deed upon which it is indorsed was indexed in the general index, as required by sec. 759, R. S. 1878? We think it is. The statute nowhere requires that the fact of indexing is to be certified or indorsed upon the deed, but it does require that the entry in the general index shall be made *immediately* upon the receipt of the instrument "in the order of time in which it was received, the day, hour and minute of reception, and the same shall be con-

sidered as recorded at the time so noted." Sec. 759, *supra*. Sec. 758 provides that it shall be the duty of the register of deeds "to indorse upon each instrument or writing received by him for record, his certificate of the time when it was received, specifying the day, hour and minute of reception and the volume and page where the same is recorded, which shall be evidence of such facts." Now, it is argued that under this provision the certificate upon the deed is only evidence of the time of reception of the deed, and of the fact that it has been recorded at length in a certain book. If it be granted that this is the proper meaning of the statute, still the result claimed does not follow. It is made the duty of the register to index the instrument *immediately* upon its receipt. This act is the very first act to be done, and must necessarily precede the recording at length of the instrument. It is a universal presumption that a public officer performs his duty as the statute requires; hence when it appears by due certificate that the register has received the instruments, and recorded the same at length in the records, it must necessarily be presumed that he has performed the duty which the statute imposes upon him preceding the recording at length, namely, the duty of making the proper entries in the general index. This is but a reasonable and fair presumption, and one which, we think, has been uniformly acted upon by trial courts without question. If, as matter of fact, the register of deeds has neglected his duty, and made no entry in the general index, that fact can be easily shown by proof. Until the introduction of such proof, the presumption of due performance of official duty arising from the certificate showing the receipt and recording of the instrument at length must prevail. This conclusion disposes of the only objection made to the respondent's title, and makes it necessary to consider the validity of the appellant's tax deeds. The statute of limitations not having run upon these deeds at the time of

the commencement of the action, the record of the tax proceedings was introduced for the purpose of showing alleged defects therein, rendering the deeds invalid. These alleged defects will be considered.

1. Sec. 1130, R. S. 1878, requires the county treasurer on the first Monday in April in each year to make out a statement of all lands upon which the taxes remain unpaid, with an accompanying notice of the sale thereof on the third Tuesday in May following, and cause such statement and notice to be published once in each week for four successive weeks prior to the day of sale, and copies thereof to be posted at least four weeks previous to the day of sale in at least four public places in the county Sec. 1141. R. S. 1878, requires the county treasurer, immediately after the sale, to deposit with the county clerk all affidavits, notices, and papers relating to the sale, together with a statement showing the lands sold, and to whom, and for what amount. It appears that no original statement and notice such as is described in sec. 1130, *supra,* was kept by the treasurer or filed in his office, and this is claimed to be fatal to the validity of the sale. It appears, however, that the treasurer in each case made out a notice substantially as follows:

"State of Wisconsin, County of Chippewa–ss.:

"Notice is hereby given that so much of each tract or parcel of land in the annexed and following statement as may be necessary therefor, will, on the third Tuesday of May A. D. 189– being the —— day of said month and the next succeeding days, be sold by me at public auction at the county treasurer's office in the courthouse in the city of Chippewa Falls in said county of Chippewa for the payment of taxes, interest and charges due thereon for the year 189–. Said sale to commence at nine o'clock sharp in the forenoon.

"Dated at the Co. Treasurer's office in the city of Chippewa Falls in said county of Chippewa, the —— day of April, 189–.

"Henry Goetz,
"Co. Treas."

It also appears that attached to this notice there was a list of the parcels of land to be sold, headed as follows, but not signed by the treasurer:

"Statement of all lands in the county of Chippewa in the state of Wisconsin, except public lands held on contract and lands mortgaged to the state upon which the taxes for the year 189– have been returned as delinquent and which remain unpaid on the first Monday in April, A. D. 189– being the —— day of said month; that is to say [here follows a statement of the several parcels of land]."

It is claimed by the respondent that this statement and notice is in the nature of a public record, and that, while there is no statute specifically requiring an original to be kept on file in the county treasurer's office, still it is manifestly essential that there should be such an original preserved and on file. We can hardly agree with this contention. The manifest object and purpose of the section is to *give notice* of the sale to the public and to property owners by public advertisement. To hold that, after the notice had been fully given in every respect as required by the law, the sale must be held invalid because the original of the notice had not been kept by the treasurer in his office, would be to sacrifice substance to shadow. The statute simply says that the treasurer shall make out the statement and notice, "and cause *such statement and notice* to be published," and "cause to be posted up copies of such statement and notice." The natural meaning of this would seem to be that the original statement and notice is to be sent to the newspapers for publication. Certain it is that, if the notice and statement be not published, the fact that an original was carefully preserved in the treasurer's office would not save the sale. Again, both the publication and the posting are required to be proven by the filing of affidavits with the treasurer. These affidavits must necessarily contain copies of the notice and statement, so that here are preserved the very notices and statements which are effective. In view of their careful preservation, the filing of an original which

can cut no figure as notice if it differ from the notice published is unimportant, and, in the absence of a specific requirement to that effect, we hold it unnecessary.

2. It is claimed that the affidavits of publication of the notice and statement are insufficient. It appears that the affidavits simply state that "the notice of which the annexed is a printed copy taken from said newspaper has been printed," etc. Attached to the affidavit is a printed copy of the notice and accompanying statement. The contention is that there are two separate papers to be published—a "notice" and a "statement"—and that the affidavits only show the publication of the notice. The argument is not without its force, yet we think it is untenable. As will be seen by reference to the notice itself, the statement is really incorporated into the notice by the terms of the notice. It states that so much of each tract of land "in the annexed and following statement as may be necessary" will be sold. In legal effect, this is equivalent to stating in the notice itself the description of each tract of land which is to be sold. We suppose that, if the statement of parcels were inserted in the body of the notice, it would not be contended by any one that an affidavit which stated that the notice was duly published was insufficient because it did not name the statement specifically. The principle is well settled that one paper may, by apt reference and description, be incorporated into another, and become in legal effect a part thereof. Such we deem to be the case here. The statement became an integral part of the notice by apt reference, and the affidavits in question must be held, in reason, to mean that the entire notice, which, as we have seen, in legal effect includes the statement, was published.

3. The third objection which it seems necessary to consider is, however, far more serious than those which we have already discussed. That objection is that at each of the tax sales the county treasurer sold each parcel of land for fifty cents in excess of the taxes, interest, and charges legally due

thereon at the time of the sale. It was stipulated in the case that the county treasurer's statements show that the sums for which the lands were sold in each case includes the sum returned by the town treasurer, with interest to the day of sale, also the sum of twenty-five cents for an advertising fee, and twenty-five cents additional, and that certificates were issued to purchasers for the aggregate of said sums, without any additional charge for the certificate fee provided for by sec. 1196, R. S. 1878. It is claimed that both of these charges of twenty-five cents are illegal—the first, because the printer was entitled to no fee; and the second, because the certificate fee is no part of the sum for which the lands are authorized to be sold. If, as matter of fact, the parcels were sold for fifty cents, or even twenty-five cents, per parcel, in excess of the sum authorized by law, the sale must be held void. Such an excess cannot be held trivial or unimportant. *Barden v. Columbia Co.* 33 Wis. 447, 14 Am. Rep. 762. It is not denied that the statute provides for a fee of twenty-five cents per parcel for the publication of the notice of sale, which may properly be included in the sum for which the land is sold; but the claim is that no such fee can be charged in this case, because the printer did not transmit to the county treasurer his affidavit of publication within six days after the last publication thereof, and hence, under sec. 1132, R. S. 1878, is not entitled to any fee. If the fact be as claimed, there can be no doubt that the charge is illegal, because the county certainly can collect no such fee of the taxpayer unless it is obliged to pay it to the printer. It appears, without dispute, that none of the affidavits were ever filed with the county treasurer, but were all filed with the county clerk. The respondent's claim, however, is not based on this fact alone. It appears that the notices of sale were all published five times, but that the last publication was within the last week preceding the tax sale. If the fifth publication could be held to be the last legal publication, then the affidavits were filed within

six days from the last publication; but if, on the other hand, the first four publications are the legal publications, and the fifth mere surplusage, the affidavits were all filed more than six days after the last publication. We think it clear that the first four publications must be held to be the only legal publications of the notice. The notice must be published for *four* successive weeks prior to the day of sale. If the last four publications are to be reckoned as the legal publications, then the notice was only published three successive weeks, and a fraction over, before the day of sale. So it appears that the first four publications must be considered as the publications authorized by the statute, and hence that the printer was entitled to no fee for the publication. Were this otherwise, however, it is impossible to see how the charge of twenty-five cents additional could be justified. It is said that this must be presumed to be for a certificate fee. The statute provides that the county treasurer shall receive a fee of twenty-five cents for each certificate of sale. R. S. 1878, sec. 1196. This certificate fee is to be paid by the person to whom the certificate is issued, and added to the sum for which the lands were sold, and included in the certificate issued. It is said in support of the course pursued here that, even if the sum is not to be included in the amount for which the land is sold, still there is no substantial wrong, because the certificate fee must be paid upon redemption. The trouble with this argument, however, is that the law does not require a certificate fee to be paid for each parcel sold, but only for each certificate *issued,* and that the statute contemplates that one certificate may include any number of parcels sold to the same person. Reference to sec. 1140, R. S. 1878, which provides the form for certificates, shows that this is the case; and such, we think, is the practice in some localities. Therefore the certificate fee cannot properly be charged against each parcel as a part of the sum for which the parcel is sold.

These considerations demonstrate the invalidity of the tax deeds relied upon by the appellant, and the correctness of the judgment.

*By the Court.*—Judgment affirmed.

The appellant moved for a rehearing.

The following opinion was filed June 18, 1903:

WINSLOW, J. A motion for rehearing is made in this case, and will be briefly considered.

In the former opinion it was held that each parcel of land was sold for an illegal excess of fifty cents, of which twenty-five cents was composed of an authorized printer's fee for publication of the notice of sale, and twenty-five cents for a certificate fee. The inclusion of the printer's fee was held illegal because the affidavits of publication were not transmitted or filed within six days after the last publication of the notice as required by sec. 1132, Stats. 1898, and consequently the printer was entitled to no fee. We are strongly urged to reconsider this holding on the ground that the affidavits were in fact filed within the required time. This claim is based on the contention that the words "last publication," in the section, should be construed as meaning the last completed week of publication, and not the last issuance of the paper containing the notice. The statute says that the printer shall receive no pay unless the affidavit is transmitted within six days after the "last publication" of the statement and notice. We cannot agree with appellant's contention. The purpose of this strict requirement is unquestionably to make it sure that the proof of proper publication shall be in the hands of the treasurer before the sale takes place, and before the filing of all the papers with the county clerk under sec. 1141. The sale must take place on the third Tuesday in May (Id. sec. 1130), and the publication is to be made for four successive weeks prior to that day. The full

period of twenty-eight days from the date of the first publication must expire before the day of sale, and that period may expire on the day before the sale, but generally expires less than six days preceding the day of sale. Thus if the affidavit were not required to be transmitted until six days after the completed period of twenty-eight days, it would frequently fail to be in the hands of the treasurer before the sale, and the treasurer could not transmit it to the clerk with the statement of the sale and the other papers immediately after the sale, as he is required to do by sec. 1141. These considerations seem to us to demonstrate quite conclusively that the words "last publication," in sec. 1130, should be taken in their natural and ordinary sense, as referring to the last issue of the paper in which the statement and notice were legally published, and not to the completed period of publication.

As to the certificate fee, however, which was included in the amount of each sale, we are satisfied that the former ruling should be overruled. While it is certain that the statute does not contemplate that the certificate fee shall be included in the sum for which the lands are actually sold, it does provide that a certificate fee of twenty-five cents shall be added to the amount of the sale, and paid by the purchaser. Now, if it be a fact that a separate certificate issues to the purchaser upon each parcel sold, it makes no difference to the owner whether the fee be included within the amount for which the lands were sold, or be added to the amount afterwards. In either event, the owner, upon redemption, will have to pay the same sum. The former ruling was based on the fact that the form of certificate prescribed by sec. 1140 shows that several parcels sold to the same person might be legally included in the same certificate, and in such case there would only be one certificate fee for perhaps a large number of parcels. We are convinced, however, that, while this course is permissible, the natural course is to issue a separate certificate upon each parcel sold. Such is the more con-

venient course of the county officers and for the certificate holder, because then, in case of redemption of a single parcel, the holder may, under sec. 1168, receive his redemption moneys upon surrender of the certificate covering that particular parcel, and this is undoubtedly the course contemplated upon redemption by the last-named section. Assuming that this is the custom almost, if not quite, universally pursued, we recede from the position taken in the former opinion, and hold that the inclusion of the certificate fee in the sum for which the lands were sold is an immaterial irregularity, not prejudicial, and hence not ground for setting aside the certificate.

Finally our attention is called to the fact that one assignment of error was overlooked in the former opinion. The court made a conditional order for judgment under sec. 3087, Stats. 1898, by which the plaintiff was required to pay into court for the use of the defendant within ninety days the aggregate sum for which the lands were sold, less the sum of twenty-five cents on each sale of each parcel. It is claimed by the appellant that under the section in question the plaintiff should have been required to pay into court the whole sum for which the lands were sold, including the twenty-five cents excess on each parcel. To this the respondent replies that it would be paradoxical to require the plaintiff to pay a sum which could not be legally imposed as a tax. The wording of the statute certainly justifies the appellant's contention. Sec. 3087, Stats. 1898. It provides that the court shall order the plaintiff to pay "*the amount* for which the land was sold," with interest, etc. This section was held constitutional in *Wis. Cent. R. Co. v. Wis. R. L. Co.* 71 Wis. 94, 36 N. W. 837, though the point now urged was not there involved. While there are quite persuasive reasons against the policy of a statute requiring the owner to pay sums in excess of legal taxes as a condition of relief, we have not been able to see that a statute with such requirements is beyond the power of

the legislature to enact. The legislature doubtless could have made the deed conclusive proof, so far as mere irregularities are concerned, of the validity of the sale; and it is difficult to see why, if they may cut off the owner entirely, they may not impose a condition on relief like the present. Ch. 503, Laws of 1852; *Huey v. Van Wie,* 23 Wis. 613. We hold that the positive requirement must be followed, and hence that there was error in not requiring the whole sum for which the lands were sold to be deposited in court as a condition of relief.

*By the Court.*—The motion for a rehearing is denied, without costs. The judgment of affirmance in this court is vacated, the judgment appealed from is reversed, and the action is remanded, with directions to ascertain the additional amount necessary to be deposited by the plaintiff in order to entitle him to judgment, and to fix some reasonable time within which the same may be paid, and upon payment of the same to render judgment for the plaintiff, and in default of such payment to render judgment for the defendant.

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BAUSHKA, Respondent, vs. MCKEY, Appellant.

*May 29—June 18, 1903.*

*Appeal and error: Questions reviewed: Contracts: Breach: Submission of issues on conflicting evidence: Verdict: Conclusiveness on appeal.*

1. An assignment of error cannot be considered where there is no record of the action of the trial court, coming within the alleged error, to inform the supreme court what actually took place on the trial, nor exceptions in the bill of exceptions to any rulings.
2. Plaintiff agreed to drill a well on defendant's farm, the well to have a water supply to furnish defendant water for his farm and stock purposes, as the farm was then conducted, the sufficiency of the well to be tested by a farm windmill. Defendant

**refused to erect a windmill to test the capacity of the well, and there was conflicting testimony as to tests, and opinions as to the sufficiency of the water supply to meet the agreed requirements. *Held*, that a verdict that plaintiff had fully performed the contract should be sustained.**

APPEAL from a judgment of the circuit court for Grant county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This action was brought to recover the sum of $350 claimed to be due on contract. Plaintiff alleges that he contracted to drill a well for defendant. This well, to be operated by a farm windmill, was to furnish a sufficient water supply for defendant's farm and stock. Defendant admits the making of the agreement, but asserts that plaintiff wholly failed to comply with its terms. The case was tried before a jury. It appeared that plaintiff drilled a well on defendant's farm to the depth of 470 feet. The evidence tended to show that different tests were made by both parties to ascertain the capacity of this well. Plaintiff and some of the witnesses stated the well had a water supply sufficient for a farm windmill required to furnish the water for defendant's farm and stock purposes. On defendant's part there was evidence tending to show that the water supply of the well was wholly insufficient to comply with the terms of the agreement. It further appeared that defendant refused to erect a windmill on the well to test its water capacity, and that he refused payment to plaintiff for drilling the well. The jury rendered a verdict in favor of plaintiff, awarding him an amount equivalent to the contract price of the well as drilled.

The cause was submitted for the appellant on the brief of *Lowry & Carthew* and *Leo Philipson,* and for the respondent on that of *A. H. Long* and *W. E. Howe.*

SIEBECKER, J. The first error assigned pertains to rulings of the court in receiving and rejecting evidence. We find no record of the action of the court coming within this alleged

error to inform us what actually took place on the trial, nor are there any exceptions in the bill to any rulings. We cannot, therefore, consider this assignment of error.

Error is assigned on the ground that the verdict is contrary to the evidence. An examination of the record discloses evidence tending to establish an agreement between the parties for drilling a well on defendant's premises, that the well should have a water supply sufficient to furnish defendant water for his farm and stock purposes, as the farm was then conducted, and that the sufficiency of the well was to be tested by a farm windmill. It furthermore appears that plaintiff, under the arrangement, drilled a well upon defendant's premises, which was tested by himself in the presence of others, showing, in the opinion of the witnesses, a sufficient water supply to meet the agreed requirement, and that defendant refused to erect a windmill to test its capacity. Other evidence in the case was in conflict with this evidence, thus raising an issue of fact which was submitted to the jury. The jury found that plaintiff had fully performed the contract, and awarded him the amount due. An examination of the record shows that the jury were justified by the evidence in finding, either that the plaintiff fully performed, or that he had failed to perform, the terms of the contract. This question was determined by the weight and credibility they gave to the testimony of the different parties and witnesses. An examination of this testimony makes it very plain that the verdict is not only not against the clear preponderance of the evidence, but that it is well supported by the testimony. From these conclusions it necessarily follows that the case was properly submitted to the jury for a decision. The verdict of the jury must be sustained.

*By the Court.*—Judgment affirmed.

DOLAN, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

*May 29—June 18, 1903.*

***Railroads: Nuisances: Maintenance of stockyards: Evidence: Special verdict: Judgment.***

1. Under sec. 1798, Stats. 1898, a railway company is bound to receive and transport freight tendered to it for shipment, and provide suitable facilities for receiving and handling the same at any station; under sec. 1801, it is required to maintain a station at every village through which it passes which has a postoffice and a population of 200 or more, and, under sec. 1799*a*, it must receive for carriage all live stock offered to it from February 1st to September 1st, inclusive, and properly transport the same over its road. Defendant, for a number of years before plaintiff acquired title to his premises, had maintained a stockyard for receiving and shipping live stock, consisting of pens and covered sheds, directly across a sixty-six-foot street from plaintiff's dwelling. In an action for damages for a nuisance alleged to be caused by offensive odors and noises arising from such stockyard, and to procure the abatement thereof, the evidence was sufficient to sustain findings of the jury, in effect, that the defendant permitted to be sent over to plaintiff's dwelling offensive odors and noises, interfering with the physical comfort of plaintiff and his family in the occupancy of said premises. *Held*, that the questions presented were purely questions of law, and, if the defendant used all reasonable diligence in the location of its stockyard to avoid injury to others, and managed it with improved methods, using all reasonable skill to prevent its becoming a nuisance, it performed its whole duty, and, if injury resulted therefrom to plaintiff, it was *damnum absque injuria*.
2. In an action against a railway company for a nuisance in maintaining a stockyard at one of its stations, it is error to exclude evidence showing that there was no other reasonably convenient and practicable location at the station in question for the yard.
3. In an action for damages for the maintenance of a stockyard, alleged to be a nuisance, and for its abatement, a verdict which fails to determine the fact whether the location was a reasonably proper one, and also whether the defendant operated the yard with approved methods, and used reasonable skill and diligence in preventing unhealthy conditions and unpleasant noises therein, cannot sustain a judgment for the plaintiff.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an action to recover damages for an alleged nuisance, and to procure the abatement thereof. The action was tried before the court and a jury. The evidence showed that for more than twenty years the defendant has owned and occupied a railway passing through the village of Cashton, Monroe county, and has maintained and used at said village, upon its grounds, stockyards for the receiving and shipping of live stock over its road; that the stockyards consist of pens and covered sheds; that the plaintiff owns and occupies a dwelling house across a sixty-six foot street from the stockyards, which he acquired a considerable time after the establishment of the yards. The plaintiff's claim is that the stockyards were so used as to constitute a nuisance to himself and his family, by reason of offensive odors and noises therefrom. The following special verdict was rendered by the jury:

"1. Has the defendant railway company frequently, between October 1, 1898, and August 14, 1901, by the maintenance and use of its stockyards, sent over, or permitted to be sent over, upon the premises of the plaintiff, disagreeable and offensive odors, to such an extent as to materially interfere with the physical comfort of the plaintiff and his family in the occupancy of said premises? *Answer.* Yes. 2. Did disagreeable and offensive noises frequently come from the stock, when in such stockyards, to the plaintiff's premises, between October 1, 1898, and August 14, 1901, to such an extent as to materially interfere with the physical comfort of the plaintiff and his family in the occupancy of said premises? *A.* Yes. 3. Were there any acts of copulation among the stock when in such stockyards, between October 1, 1898, and August 14, 1901; and, if so, were such acts of such frequent occurrence, and so open to the view of the plaintiff and his family, as to materially cause physical discomfort to the plaintiff and his family in the occupancy of his said premises? *A.* No. 4. Was the illness of the plaintiff's wife in the fall and winter of 1898 and 1900 caused by any of the odors or noises which may have at any time come from such

stockyards, or from any other cause or causes occurring in or in connection with the use and maintenance of such stockyards? *A. (Answered by the court.)* No. 5. If the court shall finally determine that the plaintiff shall recover in this action, at what sum do you assess his damages? *A.* $144.75."

A motion for a new trial by the defendant was overruled, and judgment rendered for the plaintiff, and the defendant appeals.

For the appellant there was a brief by *Masters & Graves,* attorneys, and *H. H. Field,* of counsel, and oral argument by *Mr. Field.*

*F. V. McManamy,* for the respondent.

WINSLOW, J. This is an action at law, under sec. 3180, Stats. 1898, to recover damages for, and secure the abatement of, a nuisance. The alleged nuisance consists of stockyards, maintained by the defendant upon its depot grounds at the village of Cashton, from which offensive and injurious odors and noises are said to proceed to the great discomfort of the plaintiff and his family. The evidence was entirely sufficient to sustain the findings of the jury, and the questions presented are purely questions of law.

The defendant is a railway company duly chartered and operating a railroad. It is bound by positive requirement of law to receive and transport freight tendered to it for shipment, and provide suitable facilities for receiving and handling the same at any of its stations. Stats. 1898, sec. 1798. It is also required to maintain a station at every village through which it passes which has a post office and a population of 200 people or more. Id. sec. 1801. It must receive for carriage all live stock offered to it from February 1st to September 30th, inclusive, and properly transport the same over its road. Id. sec. 1799*a*. In order to discharge the statutory duty of receiving and transporting live stock, it must have facilities for the purpose at its stations, or in some convenient place within a reasonable distance. Inasmuch as it

cannot have a train ready at all times to immediately receive and transport the stock offered, it must necessarily have yards or inclosures in which the animals may be kept until they can be taken away in the regular course of the operation of the road. That offensive smells and unpleasant noises will inevitably come from such yards, when in use, is matter of common knowledge. The skill of man has not yet devised means, within the bounds of reasonable expense and diligence, by which these disagreeable results can be wholly avoided. It must follow that, if a railway company exercises reasonable and proper diligence and care in the location of its yards and in its management, it has performed its whole duty. Impossibilities cannot be required. Duties cannot be imposed, and punishments inflicted, simply because the duties have been performed. If injury results to others, it must in such case be *damnum absque injuria.* The same rule must apply which applies to noise and smoke and steam resulting from the operation of the railroad. If these annoyances result simply from the necessary and proper operation of the road, they must be borne. If the company use the best and most improved devices to prevent injury to others, it is protected by its franchises. If it is negligent in this regard, it must respond in damages, if a nuisance is thereby created. 2 Wood, Nuisances (3d ed.) § 755. So, in the case of stockyards, the railway company must use all reasonable diligence in the location of its yards, to avoid injury to others, and must manage them with approved methods, using all reasonable skill to prevent their becoming a nuisance. It cannot unnecessarily or unreasonably locate its yards in close proximity to dwellings or business houses, to their injury, without incurring liability. It must, doubtless, in order to perform its duty, place the yards in a reasonably practicable and convenient location in the vicinity of its station, for the reception and shipping of cattle, but it must at the same time place them where they will do the least possible injury to

others. If these requirements be fulfilled, and if the yards be operated without negligence, and with that skill and diligence to avoid noise and noxious smells therefrom which the importance of the duty demands, there can be no liability, even though injury may result to others. Such injury, like many others, is simply one of the penalties we have to pay for the conveniences of modern methods of transportation.

Much reliance was placed by the plaintiff upon *Baltimore & P. R. Co. v. Fifth Baptist Church,* 108 U. S. 317, 2 Sup. Ct. 719, and *Anderson v. C., M. & St. P. R. Co.* 85 Minn. 337, 88 N. W. 1001. In the first of these cases a railroad company had constructed a roundhouse and machine shop next to a church, and the noise seriously disturbed the religious exercises. This was held to be an actionable nuisance, but the fact plainly appeared in the case that the location was unreasonable, and that there were many other places in the city where the shop could have been placed, and answer all railroad purposes fully as well. These being the facts, it was held that the shop so situated was a nuisance, and that, whatever rights were conferred on the railroad company by its charter, they were subject to the qualification that their works should not be so placed as by their use to *unreasonably* interfere with and disturb the comfort of others. The case goes no further, and, when rightly understood, it does not antagonize the propositions already laid down in this opinion. The second case cited is a stockyards case, and contains language tending to justify plaintiff's position here. In that case, however, the evidence established the fact that the yards were kept in an absolutely filthy condition, to the extent that dead animals were allowed to remain in them and become putrid. In view of these facts, the opinion must be read. The court said, in substance, that defendant's claim was that it had a right to select any place on its right of way for the reception and shipment of stock, but that it could not be conceded that a railroad company could rightfully create

noxious conditions on its own property so near the private dwellings of others as *unnecessarily* to interfere with the health of the inmates. Here the element of necessity, which must mean reasonable necessity in the proper conduct of its business, is plainly recognized. This is not the case of a manufacturing company, which may purchase property and locate its works wherever it may choose. The stockyards must be adjacent to the railroad line, the location of which is fixed, and they must be at or in convenient proximity to a station. It will not do to say that the company must go out into unsettled districts in the country for its stockyards, for this is to say that, as soon as people begin to reside in the vicinity, the yards must be again removed to some more secluded spot, and so on *ad infinitum.*

The defendant attempted to introduce evidence showing that there was no other reasonably convenient and practicable location at Cashton for the yards, but the evidence was excluded. This was plainly error. *Illinois C. R. Co. v. Grabill,* 50 Ill. 241; *Dunsmore v. C. I. R. Co.* 72 Iowa, 182, 33 N. W. 456; *Shirely v. C. R., I. F. & N. R. Co.* 74 Iowa, 169, 37 N. W. 133. The verdict fails entirely to determine the fact whether the location was a reasonably proper one, and also fails to find whether the company operated the yard upon approved methods, and used reasonable skill and diligence in preventing unhealthy conditions and unpleasant noises therein. In the absence of findings on these questions, the judgment cannot be sustained.

*By the Court.*—Judgment reversed and action remanded for a new trial.

LARSON, Appellant, vs. OISEFOS and wife, Appellants, and WYCKOFF, Respondent.

*May 29—June 18, 1903.*

*Vendor and purchaser of land: Land contract: Foreclosure: Appeal and error: "Aggrieved party": Right of appeal: Practice: Subrogation: Rights of purchaser at execution sale.*

1. The right to appeal from a judgment is confined to parties aggrieved in some appreciable manner by the decision involved. If the appellant is a person not so aggrieved, he is deemed not to be within the provisions of the appeal statutes, and the rule is to dismiss the appeal.
2. Where, in an action to foreclose a land contract, the judgment in favor of plaintiff provided that an execution purchaser should be subrogated to plaintiff's rights on paying the amount found due by the judgment, plaintiff is not prejudiced and has not sufficient interest in that matter to maintain an appeal.
3. A portion of the land included in a land contract was sold under execution against the vendee, the part not sold being the homestead of the vendee. Subsequently the vendor foreclosed the land contract, and the judgment provided that the execution purchaser might be subrogated to the vendor's rights on paying the amount due on the judgment. *Held*, that the court erred in decreeing to the execution purchaser the privilege of redeeming from the land contract and thereby acquiring the homestead rights of the vendee. The limit of acquirement by such redemption should be sufficient to indemnify the execution purchaser for cost of making redemption in excess of the value of the land at the time of the execution sale over what he paid for the equity therein.
4. In such case, in order to work out complete subrogation, the vendee is entitled to the unused value which the execution purchaser did not pay at the execution sale, to indemnify such vendee against being compelled to make up such value in order to save the homestead, and the execution purchaser is entitled to the benefit of the vendor's lien on the homestead to indemnify himself against loss by being compelled to contribute more than such unused value to save what he acquired at the execution sale from plaintiff's lien.

APPEALS from a judgment of the circuit court for Trempealeau county: J. J. FRUIT, Circuit Judge. *Reversed on one appeal; the other appeal dismissed.*

Action to foreclose a land contract. The complaint was in the usual form. The vendee was the defendant, *Syver Olson Oisefos.* The land consisted of 120 acres. The purchase money unpaid at the start was $892. Later $90 was paid. All was due when the action was commenced. Prior thereto defendant *James N. Wyckoff,* in proceedings for the enforcement of a judgment against *Oisefos,* acquired by a sheriff's deed all of the latter's interest in eighty acres of the land. The other forty acres was occupied by *Oisefos* and wife as a homestead. *Wyckoff* answered, setting forth the facts as to his title, and asking, among other things, that the amount found due plaintiff, if adjudged to be a lien upon the eighty acres paramount to the title under his sheriff's deed, be apportioned between that and the homestead forty. The court found due plaintiff $1,183.90, and that she was entitled to judgment in due form as to the entire 120 acres, leaving *Wyckoff's* title subject thereto. Judgment was so rendered December 14, 1901, the time for redemption being fixed at ninety days. March 3d thereafter, upon the hearing of an order to show cause, made some time previously and in form at the term of court at which the judgment was rendered, it was modified, enabling *Wyckoff,* upon paying plaintiff the amount adjudged to her, to be subrogated to her rights as against the vendee in the contract. It was also adjudged that in case *Syver Olson Oisefos,* within the time limited for redemption, should pay according to the judgment, he should be entitled to a deed of the 120 acres, subject, however, to the full fee title of the eighty acres in *Wyckoff.* From that judgment *Oisefos* and his wife appealed, and also the plaintiff.

For the plaintiff there was a brief by *Anderson & Ekern,* and oral argument by *H. L. Ekern.*

*Robert S. Cowie,* for the appellants *Oisefos.*

For the respondent *Wyckoff* there was a brief by *Richmond*

*& Richmond,* attorneys, and *Bleekman & Bloomingdale,* of counsel, and oral argument by *S. Richmond* and *F. H. Bloomingdale.*

MARSHALL, J. Plaintiff obtained a decree awarding to her the full relief claimed in her complaint. She challenges the judgment only because of the relief given to *Wyckoff,* not affecting her in any way. We are unable to see how she can be deemed to have a sufficient interest in that matter to enable her to maintain her appeal. It is entirely immaterial to her whether *Wyckoff* pays the amount adjudged to be due her, or whether the vendee in the land contract pays the same. It is entirely immaterial to her what the rights of such vendee and *Wyckoff* are between themselves, so long as the right adjudged to either in no way abridges that claimed by or adjudged to her. There is no such abridgment; therefore it necessarily follows that she is in no way prejudiced by the judgment, regardless of what the rights are of the other parties to the litigation. It by no means follows that every party to a judgment has a right to appeal therefrom merely because it is wrong. The right of appeal is confined to parties aggrieved in some appreciable manner by the decision involved. When a person not so aggrieved appeals, he is deemed not to be within the provisions of the appeal statutes. In such circumstances the court obtains no jurisdiction to consider any matter raised by the appeal. Upon its attention being called to the situation, the rule is to dismiss the appeal. *Amory v. Amory,* 26 Wis. 152. That must be the result in this case as to plaintiff's appeal.

It is claimed on the part of appellants *Oisefos* that the principles of subrogation do not apply to *Wyckoff,* as regards the rights of the vendee in the land contract. That, as it seems, may be tested by a concise statement of such principles and by testing the facts thereby. They are purely equitable in character. The sole purpose thereof is to prevent one per-

son from in the end escaping those burdens which belong to him to bear, yet fall presently upon another who is compelled temporarily to assume them to protect his own interests. They apply whenever one person for his own protection is compelled to assume the debt of another, which such other in equity and good conscience should pay. All difficulties cease, generally, where subrogation is claimed, when the essential facts involved are clearly understood.

Testing the case in hand by what we have said, we find all the essential facts referred to without serious difficulty. The debt due upon the land contract was that of *Oisefos*. The legal title to the three forties of land covered by the contract were held by plaintiff to secure payment of the amount due thereon. The equitable ownership of the forty claimed by *Oisefos* was as firmly so held as the equitable title to the two forties possessed by *Wyckoff*. There was no way by which the latter could protect his equity except by paying the indebtedness of the former. The equity of redemption as to the two forties was inseparably connected with that of the other forty. The latter could not be redeemed from without redeeming from the other, and *vice versa*. *Wyckoff* was under no obligation, legal or equitable, in case of assuming the burden of redeeming all of the land in order to preserve his own interest, to bear it permanently, so far as that would benefit *Oisefos*, without any consideration moving directly or indirectly from him to pay therefor. Such assumption could not be deemed voluntary and subrogation fail on that account, since the element of necessity as to *Wyckoff* to prevent the loss of his own property moving him to action would be inconsistent therewith.

The judgment in this case was evidently rendered upon the theory that the sole essential to the applicability of the doctrine of subrogation is that the person to be subrogated shall for his own protection pay the debt of another. Such, obviously, is not sufficient. There must be, in addition to legal

liability of such other for the indebtedness and payment thereof by such person under compulsion to save his own interests, the obligation of such other in equity and good conscience to reimburse such person for the protection accorded him by the latter's act, which would otherwise entail a loss to him. It follows that, if the judgment complained of goes further than to enable *Wyckoff* to indemnify himself against a loss which would otherwise go to enrich *Oisefos,* it violates the fundamental principles of subrogation. That is used, as before indicated, to prevent one person, who, acting with clean hands to protect himself, incidentally but necessarily lifts a burden from another, giving him aid which he cannot in justice continue to enjoy without indemnifying such person against loss in the transaction. Subrogation does not in any case legitimately put money, as mere gain, into the purse of any one. It is grounded in the benevolence, so to speak, of equity jurisdiction. Obviously, to use it to aid a wrong, or to promote the accumulation of property by one without yielding up an equivalent therefor, would be inconsistent with the plainest principles of equity. The cases illustrative of this are numerous. *McLaughlin v. Curts' Estate,* 27 Wis. 644; *Swarthout v. C. & N. W. R. Co.* 49 Wis. 625, 6 N. W. 314; *Conner v. Welch,* 51 Wis. 431, 8 N. W. 260; *Railroad Co. v. Soutter,* 13 Wall. 517; *Griffith v. Townley,* 69 Mo. 13; *Meyer v. Mintonye,* 106 Ill. 414; *German Bank v. U. S.* 148 U. S. 573, 13 Sup. Ct. 702; *Schoonover v. Allen,* 40 Ark. 132.

Counsel for appellants *Oisefos* insist that the result of the judgment complained of, should it stand, will be one which, as stated, subrogation cannot be legitimately used to produce; that whereas *Wyckoff* purchased only the value of the equity of redemption as to the two forties of land, the value thereof, after deducting from the full value of the land the amount of the incumbrance chargeable thereto, the judgment says that he shall have, in addition thereto, the whole of the forty

possessed by *Oisefos,* or, in lieu thereof, the difference between what he paid for and the full value of the land as a clean profit. Counsel seems to be right in that. We are unable to see any escape from it. Counsel for respondent fails to suggest any. A reference to the doctrine that if one person pays off a lien upon property which belongs to another, in order to protect himself from loss, in the due exercise of the right of redemption as to other property owned by himself, he is entitled to be subrogated to the rights of such lienor, there being no superior equity, does not reach the question. In all such cases, as will be easily seen, subrogation merely takes place to allow the person paying under compulsion a prior lien to shield himself against loss. He can invoke subrogation merely as a weapon of defense against loss. If a person buys an equity of redemption in property, paying for that only, the subject of the purchase becomes legally bound as to all underlying claims thereon, and the purchaser, to the extent of the value of the property in excess of the equity purchased, becomes morally bound to protect those responsible personally for such claims. In the light of those elementary principles, *Wyckoff* is entitled to keep, as against the whole world, just what he acquired through the execution sale and gave an equivalent for. Equity will not aid him in obtaining more, through the use of the principles of subrogation, but will rather aid in preventing him from obtaining more to another's loss. So it is held, as contended by appellants *Oisefos,* that where a person acquires title to realty by the enforcement of a junior lien, paying therefor merely the value of the equity, he not only cannot, if compelled to pay off the senior lien, it being also an incumbrance upon other property, be subrogated to the rights of the payee against his debtor, as to the difference between the full value of his own property thus redeemed at the time of his purchase of the equity therein and what he paid for such equity, but such debtor, upon paying off such lien, may him-

self be subrogated to the rights of his creditor as to such difference. 1 Jones, Mtgs. §§ 735–737; *Booker v. Anderson,* 35 Ill. 66.

In the light of the foregoing it must be held that the trial court, instead of decreeing to respondent the privilege of redeeming from the land contract and thereby acquiring all the rights of plaintiff therein, the limit of acquirement by such redemption, as against *Oisefos,* should have been sufficient to indemnify respondent for the cost of making the redemption in excess of the value of his land at the time of the execution sale over what he paid for the equity therein.

On the question of how far it is necessary for subrogation to go in *Wyckoff's* favor as indemnity, appellants' counsel are in error. That comes from a wrong view of the value of the equity of redemption in the two forties at the time of the execution sale. If it were the full value of the land less the entire amount due upon the land contract, counsel would be right. But it is the full value of the land at the time of the sale, less such proportion of the indebtedness as such full value bears to the then value of all the land covered by the contract. The entire amount of the unpaid purchase money upon the contract cannot be deemed to have been a lien upon the two forties sold at the sheriff's sale, because the other forty was the homestead of *Oisefos* and wife, and in case of a sale under a mortgage foreclosure, it would not be chargeable with the lien of the foreclosure judgment, except contingent upon the proceeds of the other lands covered not being sufficient to discharge the judgment, if they could be sold separate from the homestead without injury to the interests of the parties. We have no such situation to deal with here. The rights of the owner of the homestead in such circumstances exist by force of the statute (sec. 3163, Stats. 1898). *White v. Polleys,* 20 Wis. 503; *Hanson v. Edgar,* 34 Wis. 653. In case of a prior mortgage lien covering a homestead and other lands being paid off by the owner of a junior lien

on the equity of redemption in the lands outside of the homestead for his protection, he cannot have the aid of equity jurisdiction to enforce the prior lien against the homestead till the other lands are first exhausted, because the mortgagee himself could not so deal with the homestead. A right acquired by subrogation does not increase by the transfer from one to the other. Here the right of the primary owner was the same as to the homestead forty as the other lands. She held the legal title to all thereof, with the right to have the same freed from equities resting thereon, upon noncompliance by the owners thereof with the conditions of the judgment of strict foreclosure. Respondent is entitled to the same right upon paying the plaintiff's claim, so far as he would otherwise suffer loss under the principles stated.

The result is that appellants *Oisefos* are entitled to the benefit of the unused value of the two forties of land, that is, the value which respondent did not pay for at the execution sale to indemnify themselves against being made poorer by being compelled to make up such unused portion in order to save the homestead forty. Respondent is entitled to the benefit of plaintiff's lien on the homestead forty to indemnify himself against loss by being compelled to contribute more than such unused value of the two forties to save what he acquired at the execution sale from the plaintiff's lien. The parties, by reason of their relations to the land covered by the contract, and the facts, are entitled to indemnity against loss, each against the other. That is the law of subrogation, and as far as it goes. In order to properly work out the equities as stated, it will be necessary to determine the value of the two forties of land covered by the execution sale at the time thereof, and the then value of the forty possessed by *Oisefos*. The equities must be adjusted as of the instant their relations commenced.

It seems that the value of the two forties of land, if to be governed by the general rule, should be taken to have been

liquidated, so to speak, by the sale. Property is liable to be so sold on execution, that a court of equity would not regard the result as even *prima facie* evidence of value; but ordinarily the amount realized at a fair execution sale is taken as the true value to be dealt with in the administration of justice. There is nothing in this case to take it out of that rule. We must presume that the amount which the equity in the two forties sold for, and such proportion of the whole amount adjudged to be due upon the land contract as the value of such two forties at the time of such sale bears to the then value of all the land covered by the contract, will together correctly measure the full value of such two forties. By giving appellant *Oisefos* credit upon the amount adjudged to be due upon the land contract as between himself and respondent, in case the latter redeems from plaintiff's claim, of such sum as will, with what the equity in the two forties sold for at the execution sale, equal the then full value of such two forties as ascertained in the manner aforesaid, and respondent be subrogated to the rights of the plaintiff against the other forty only for the balance of such amount, neither will suffer any loss by reason of anything being acquired from him directly or indirectly by the other without yielding up an equivalent therefor.

In order to render a proper decree, further evidence must be taken and findings made. The amount adjudged to be due upon the land contract must be apportioned between the two holdings of land as of the time of the execution sale, as we have indicated. A judgment should then be rendered in form in favor of the plaintiff and against all the defendants, with a provision that upon payment being made to her within the time limited therefor, by either party interested in the equity of redemption, she shall make such party a deed in harmony with the terms of the land contract, subject to the right of the other party interested in the equity of redemption to a deed, from such grantee, of the land to which his equity re-

lates, upon payment to such grantee, within some reasonable time to be fixed by the judgment, of the amount chargeable by the terms thereof to such equity.

*By the Court.*—The judgment is reversed on the appeal of appellants *Oisefos,* and the cause remanded for further proceedings in accordance with this opinion. The appeal of the plaintiff is dismissed.

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ABBOTT, Respondent, vs. CREMER and another, Appellants.

*May 29—June 18, 1903.*

***Waters and watercourses: Ice formed on mill pond: Ownership: Rights of lessee of water power in ice: Justices' courts: Plea of title to real estate: Failure to give bond: Presumptions.***

1. The title to the beds of streams, and the title to ice forming on mill ponds created therein, is in the riparian owner.
2. Plaintiff brought an action to recover damages for taking ice which he claimed to own. He asserted no other right or interest than that secured from the lessee of a mill, and water power appurtenant thereto on which the ice had formed. The lessee had no interest in the ice except his rights as lessee of the mill and water power and to the flow of water. *Held,* that thereby the lessee acquired no right or title to the soil under the pond, nor any interest in the ice formed of the water of the pond, and that any right or privilege obtained from such lessee by plaintiff to cut the ice in question, conveyed no right to plaintiff superior to the right of any other person trespassing thereon.
3. In such case, plaintiff had cleaned or scraped off the ice, and examined it preparatory to cutting it, when defendants cut the ice in question, under permission from the riparian owners. *Held,* that the acts of plaintiff were not sufficient to constitute a legal appropriation of the ice, and that the ice was in the actual possession of the riparian owners when defendants took possession.
4. Plaintiff brought an action to recover damages for taking ice which he claimed to own. He asserted no other right or interest than that secured from the lessee of a mill, and water

**power appurtenant thereto on which the ice was formed, the lessee having no right or title to the soil under the pond, and hence none to the ice. *Held*, that if plaintiff had any right to the ice, it was because he had appropriated it and reduced it to possession, making it personal property, and it was therefore error to hold that, since defendant had failed to give the bond required by sec. 3620, Stats. 1898, it must be presumed that plaintiff had title to and possession of the ice.**

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an action to recover damages for taking ice which plaintiff claims he owned and possessed as purchaser from the lessee of the mill appurtenant to the land and ice pond. It appears that William Vogel was lessee of the mill property in question; that plaintiff sought to purchase the exclusive right to cut the ice on the mill pond, and that the lessee of the mill gave him the privilege to cut whatever ice he needed; that under this arrangement plaintiff cleaned off and examined a portion of the ice preparatory to cutting it; that defendants cut some of the ice which plaintiff had thus sought to appropriate under permission given them by the lessee and Mrs. Vogel, lessee's mother, who claimed to act for the tenants in common of the land and the mill pond. The case was tried in justice court before a jury, which rendered a verdict for the plaintiff awarding him $10 damages. Judgment was entered for this amount, with costs. Upon appeal to the circuit court this judgment was affirmed upon the record.

For the appellants there was a brief by *Doherty & Baldwin,* and oral argument by *C. L. Baldwin.*

*J. P. Sullivan,* for the respondent.

SIEBECKER, J. The ice field in controversy was located on land covered by a mill pond owned by Mrs. Vogel and her children as heirs of the deceased husband and father. The testimony tends to show that William F. Vogel was lessee of the mill and the water power appurtenant thereto, but

nothing appears to show that he had any other interest in the mill property or in the land upon which the mill pond is situated. Plaintiff asserts no other right or interest to this ice bed other than the right secured from the lessee of the mill property. It is the settled law in this state that the title to the beds of streams is vested in the riparian owners. *Olson v. Merrill,* 42 Wis. 203; *Reysen v. Roate,* 92 Wis. 543, 66 N. W. 599. It is also established that the title to ice forming on ponds is in the person owning the soil. *Reysen v. Roate, supra.* Nothing appears in the case to show that the lessee, Vogel, had any interest in the ice bed except his rights as lessee of the mill and water power and to the flow of water. This gave him no right or title to the soil under the pond, nor any interest or right to the ice formed of the water in the pond. Any right or privilege obtained from him by the plaintiff to cut the ice in question conveyed no right to nor interest therein superior to the right of any other person trespassing thereon. Under the circumstances the conduct of plaintiff in attempting to appropriate the ice by cleaning and examining it preparatory to harvesting vested no right or interest in him. Can it be held that he had lawful possession as against the defendant? As indicated, he was not in possession as owner, nor was he, under the privilege given him by the lessee, in possession as licensee. True, he had cleaned or scraped off the ice, and examined it for the purposes indicated; but, since these acts were done by him without any right or authority, they are not sufficient to constitute a legal appropriation of the ice. Under the facts of the case the ice was in the actual possession of the owners of the soil at the time defendants took possession. *Reysen v. Roate, supra; Balcom v. McQuesten,* 65 N. H. 81, 17 Atl. 638; *Bigelow v. Shaw,* 65 Mich. 342, 32 N. W. 800; *Becker v. Hall,* 116 Iowa, 589, 88 N. W. 324. Construing the evidence in the case in the most favorable light to plaintiff, no grounds are established upon which he can recover against the defendants.

Upon appeal the circuit judge held that the issues involved title to land, and, since defendants failed to give the bond required by sec. 3620, Stats. 1898, it must be presumed that plaintiff had title to and possession of the ice. For the reasons above stated, no such issues were properly presented by the record. If the plaintiff had any right to the ice, it could only arise upon the ground that he had appropriated and reduced it to his possession, making it personal property. His acts to this end do not furnish a ground for an appropriation and possession of the ice, hence no title to real estate was raised by the issues. It therefore is a proper case to be tried upon the record on appeal, and judgment should be awarded according to the weight of the evidence and the justice of the cause. This error in procedure by the circuit court necessitates a reversal of the judgment.

*By the Court.*—Judgment reversed, and cause remanded, with directions to reverse the judgment of the justice and render judgment dismissing plaintiff's complaint.

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EVANS, Respondent, vs. BACON, Appellant.

*June 1—June 18, 1903.*

*Waters and watercourses: Water power: Milldams: Abatement of unlawful height: Evidence: Appeal and error: Judgment.*

1. Evidence in an action by the proprietor of an upper water power to abate the height of the dam of a lower owner examined, and *held* to sustain a finding that defendant's dam had been raised in violation of sec. 3375, R. S. 1878, forbidding the erection of a dam to the injury of any existing mill.
2. In such case, the judgment improperly provided that the dam and *water* should be lowered three feet, and was modified so as to require the dam to be lowered three feet.

APPEAL from a judgment of the circuit court for Monroe county: JAMES O'NEILL, Judge. *Modified and affirmed.*

Action to partially abate a dam. Plaintiff and defendant were owners of improved water powers on Beaver creek, Monroe county, Wisconsin, defendant's being the lower one. The dams were built about forty years prior to the trial, defendant's being the one first constructed. Plaintiff's claim, upon which he recovered, was that when defendant's dam was authorized and constructed to the height of nine feet above the natural bed of the creek, and the upper dam was built with reference thereto, the backwater from the lower power did not reach the tailwater of the upper one, and between 1897 and 1899 the lower dam was raised about three feet, to the injury of the upper power in that it raised such water so as to flood plaintiff's wheel and shorten the working head at his power about three feet.

There were two trials. On the first a jury rendered an advisory verdict, the findings being in plaintiff's favor, the increased head of water found, however, being less than ultimately found. The circuit judge died, rendering a new trial necessary. Upon the second trial findings of fact were made to the following effect: Plaintiff's dam was built in 1856 and defendant's in 1855, the latter being authorized and constructed to raise a nine-foot head of water. Such head was not materially increased thereafter till 1897. Subsequently thereto, and chiefly in 1899, when a new dam was put in, the old one having been carried out by high water, a head of water was created three feet higher above the old creek bed than was created by the improvement of 1855 and the head that had been maintained uniformly up to 1897. By reason of the increased height of the dam the water was raised at plaintiff's dam so as to shorten his working head some three feet. In order to restore the former conditions it is necessary to reduce the level of the water at defendant's dam to a point three feet below the top of the flashboards thereon. The damages suffered by plaintiff up to the time of the trial

were $300. Judgment was entered in plaintiff's favor accordingly.

For the appellant there was a brief by *Bleekman & Bloomingdale,* and oral argument by *F. H. Bloomingdale* and *A. E. Bleekman.*

*Howard Teasdale* and *George H. Gordon,* for the respondent.

MARSHALL, J. These facts, in the main, are conceded by the parties: Appellant's mill privilege was improved about 1855. Respondent's was improved about one year later. The lower proprietor was at the start entitled to create a head of water of nine feet regardless of its effect upon the mill privilege above. The relative rights of the upper and lower proprietors did not change from 1855 till the commencement of this action. At no time prior to 1899 did the operation of the lower power materially encroach upon the upper power. While the lower dam was carried out several times and was as often rebuilt, the one in place when this action was commenced was substantially in the location where the first dam was constructed. Except as otherwise affected by contract, the rights of the owner of the lower power in 1878 became fixed by sec. 3375, R. S. 1878, as amended in that year, precluding him from thereafter raising the height of his dam to the injury of the upper proprietor.

The court granted judgment in respondent's favor upon the theory that appellant's dam was raised some three feet subsequent to 1878, and three feet higher than it was ever theretofore maintained or authorized to be maintained, to the injury of respondent's power by reducing the available head of water there three feet. Counsel for appellant claim there is no evidence sustaining the finding of the court in that regard. As we view the record, if such claim cannot be sustained the judgment must be affirmed.

There seems to us, upon a careful study of the record, to

be a sharp conflict of evidence on the question of whether the lower dam was raised as alleged, with sufficient evidence in favor of the affirmative to preclude us from disturbing the trial court's finding upon the ground that it is clearly against the preponderance of the evidence. Appellant's counsel suggest that the proofs in appellant's behalf were made with reference to physical situations rendering the same conclusive in his favor. That is true if the proof as to such physical situation is conclusive, but that depends upon many things going to the credibility of witnesses. But the same is true of the evidence produced by respondent. The trial court no doubt assumed, as the evidence of appellant's witnesses tended to show, that prior to 1897 the dam was maintained substantially to its full authorized height. Mr. John Moffat, who became interested in the property in 1859, knew of it as early as 1857, and continued interested therein till 1867, testified that during his time, with a nine-foot dam, there was about a thirteen-foot head at the wheel. Mr. T. B. Gibson testified that he put in a new nine-foot dam at the lower power in 1878, obtaining a head of eleven feet, or over, at the wheel. There was much other evidence tending to show that from 1855 to 1897 the full authorized head of nine feet of water was uniformly maintained at the lower dam, without any backwater being created injurious to the upper power. True, there was evidence that plaintiff complained of backwater in 1879 and admitted that he had lowered his wheel, but he denied the same and produced testimony which, with his own, made a pretty strong case to the effect that the only change made in the wheel at any time was to raise it some four or five inches.

The foregoing, with the following brief statement of the general nature of the evidence, will show that there was good ground upon which to rest the findings that defendant's dam was raised some three feet after 1897. Regarding the finding that respondent's wheel remained in substantially the

same location as regards the bed of the creek from the first as a verity, as we must in view of the evidence, and also the finding that appellant's dam from the first was maintained at a uniform height above the bed of the creek till 1897, if there was a large increase in the height of the water after that period, as the court found, the conclusion is irresistible that an increase in the height of the lower dam must have caused it. The evidence that there was such a raise of water, if believed, puts the matter beyond any reasonable doubt. Several witnesses testified with reference to fixed objects on the bank of the pond, such as sewer openings, that the height maintained from 1855 to 1897 was thereafter materially increased. Several witnesses testified that, whereas prior to 1897 the backwater came only to within about four inches of the apron of the plaintiff's wheel, after 1899 the water rose to eight inches above the top thereof, being an increase of some thirty-two inches, which was added to by about four inches when the wheel was in operation, by reason of there not being a free flow away therefrom. An engineer who carefully observed the operation of the water at the upper dam, measured the height of the lower dam, and leveled a point above respondent's wheel with the top of appellant's dam, testified that such point was five inches above the top of the wheel, or thirty-two inches above the old level of the backwater; that appellant's dam, from the floor thereof to the top of the flashboards, was about twelve feet, and that in order to restore the former conditions at respondent's dam the level of the water at the lower dam would have to be kept three feet below the top of the flashboards as appellant maintained the same. Now, without going into the evidence in detail, we can safely say that it was as direct, positive and satisfactory as to the physical situations, indicating that the lower dam was raised subsequent to 1897, as the evidence in respect to situations indicating to the contrary. There can be no two reasonable diverse opinions on this: If the level of

the water in the creek in 1897, below respondent's wheel, was some three feet lower than at the time of the commencement of this action, as respondent's evidence clearly tends to show, and conclusively shows, if the evidence of circumstances is to be believed, the change must have been caused by an increase in the height of the dam. Further, if the dam at the lower privilege was maintained from 1855 to 1897, generally speaking, up to the rightful height, as appellant's testimony tends to show, then the increased backwater mentioned, subsequent to 1897, must have been caused by an unlawful encroachment upon respondent's rights. Witnesses may have been mistaken. They may have testified falsely. But if we take as verities that the backwater at respondent's power was three feet, or thereabouts, higher after 1899 than from 1855 to 1897, and that prior to the latter date the full rightful height of the water at the lower power was as a rule maintained, no amount of testimony from the mouths of witnesses can cast any doubt upon the truth which such circumstances indicate, namely, that subsequent to 1897 the lower dam was unlawfully raised sufficiently to cause the increased backwater.

We have not overlooked the instrument to which our attention was called by counsel for appellant, by which the privilege claimed by appellant was measured out to his distant predecessor in title. That does not change the situation. We still have the testimony which the court believed and had a right to believe, so far as we can discover, that the full granted right was as a rule enjoyed up to 1897, without raising the water to a sufficient height to interfere with respondent's power, while thereafter the working head at such power was cut down about three feet by the back water on the wheel. The rule that the decision of the trial court on matters of fact cannot be disturbed on appeal unless contrary to the clear preponderance of the evidence applies with more than ordinary force to this case because the circuit judge had excep-

tional advantages for reconciling, if possible, the conflict between evidence tending to prove appellant's side of the case and the evidence tending to prove respondent's side, and, where such reconciliation is found to be impossible, for determining what to believe and what not to believe. Then there was the circumstance of the previous trial with the verdict of a jury sustaining respondent's contention that the head of water at the lower dam was materially increased in and after 1899. The trial judge on each occasion, and the jury on the first trial, viewed the premises involved in the litigation. That was a very valuable aid in view of the fact that a filling up of the bed of the creek at the lower dam and for some distance below the same to the extent of three or four feet, subsequent to 1855, would account for the fact, if it were a fact, that, whereas at the time of the trial there was substantially the same head of water at the lower dam as in 1855, the backwater at the upper power was three feet higher at the later date than in 1855. There are ample circumstances to suggest that the bed of the creek was materially raised at the lower dam after 1855 in that many dams were carried out by high water, necessarily depositing the material of which they were composed in the creek bed. Several witnesses testified that the creek bed in 1899 was several feet higher than it was when the dam was constructed in 1855. There was considerable evidence in that line and the court found the truth to be in accordance with what such evidence tended to prove. The court was aided largely, no doubt, in reaching that conclusion, by the view of the premises. Viewing it as a verity, the conclusion as to the raising of the creek bed, the increase in the height of the backwater while the head at the lower dam remained unchanged, is clearly explained. It seems clear that if the findings of the trial court are not clearly sustained by the evidence, they are at least not against the clear preponderance thereof.

We observe that the form of judgment is that defendant's

dam and water should be lowered to a point three feet below the top of his flashboards, as said dam was constructed and maintained at the time of the commencement of this action, January 11, 1900. It is unfortunate that the decision was not made more definite and certain, and strictly in accord with the rights of the parties. Necessarily, the level of the water in the pond must vary with the stage of the water in the creek. At whatever height the dam is constructed the water will at times run over the top and at times will be below the same. It would have been better to have determined the proper height of the dam with reference to some permanent object, and then required a lowering thereof accordingly. We cannot modify the judgment in that respect, but we can so modify it as to require merely a lowering of the dam three feet, considering the flashboards as part of the dam. That will necessarily leave open, as a subject for future controversy, the question of how high the dam was maintained at the time of the commencement of this action. In case of a dispute there will be nothing in the judgment by which it can be definitely settled, and further litigation may probably result.

*By the Court.*—The judgment appealed from is modified so as to require the defendant's dam, considering the top thereof to be that of the flashboards as the same were maintained January 11, 1900, to be reduced three feet, and as so modified it is affirmed.

STONE, Appellant, vs. LITTLE YELLOW DRAINAGE DISTRICT and others, Respondents.

*June 1—June 18, 1903.*

*Drains: Drainage district: Creation: Judicial proceedings: Jurisdiction: Collateral attack: Constitutional law: Due process of law: Taking property without compensation: Excess of the taxing power: Retroactive laws: Statutes: Construction: Additional assessments without notice: Prejudicial error.*

1. Under secs. 1379—11 to 1379—31, Stats. 1898, relative to the creation, etc., of drainage districts (providing for an application to the circuit court, by petition, for the creation of a drainage district, for notice to all persons likely to be affected, for the framing of issues and the trial thereof, with or without a jury, and for the rendition of decisions on various questions, and the entry of a so-called "order," having the characteristics of a decree, based on such facts as the court shall find in view of the law), the order creating the district is the culmination of an entirely judicial proceeding.
2. In an action to restrain the enforcement of an assessment levied for improvements in a drainage district, it appeared, among other things, that a petition, complying substantially with the statute, was filed, and that notice of hearing was served on plaintiff. *Held*, that jurisdiction over the plaintiff was complete; that a decision upon all the facts presented and construction of the law governing the situation, followed by a final order or decree in accordance with such decision and construction, was also within the jurisdiction of the court, and, a remedy by appeal being provided, the decision of the court is in no wise controverted by a showing that any facts were decided wrong, or that the law was misconstrued.
3. Before the entry of a decree creating a drainage district, plaintiff, in common with other property owners, received notice and had opportunity to appear in court, offer evidence, and have a trial on every material question:—whether a public purpose was to be subserved, whether the land would be specially benefited thereby, whether the benefits to the whole district would exceed the cost, as to the proportion of such cost which ought to fall on his lands, considered relatively to all other lands in the district,—and an opportunity to appeal to the highest tribunal in the state for a review of such decision. *Held*, that such proceedings did not deprive plaintiff of his property without due process of law.

4. Where a statute relative to the creation, etc., of drainage districts provided that before proceeding to assessment it must be found and decided that the benefits were equal or exceed the amount of the cost, and it appeared that such behest had been obeyed, there is no taking of property without compensation, nor excess of the taxing power as limited by the constitution.
5. An order creating a drainage district and providing for a tax to carry on the work was sought to be enjoined. It appeared, from the complaint, that such order was a judicial determination by a court having jurisdiction of the subject matter and the parties. *Held*, that such order could not be assailed collaterally in such action, except, perhaps, for fraud.
6. Sec. 2, ch. 43, Laws of 1901, modifying sec. 1379—18, Stats. 1898 (relating to the creation, etc., of drainage districts), provides that the order confirming the report of commissioners appointed to create a drainage district might "at the same or any subsequent term, . . . be reversed, modified or changed" after notice; also that the commissioners might be permitted to file supplemental report as to any matters properly within the field of the original order, and receive direction by order of the court thereon. *Held*, that the act of 1901, being aimed wholly at the procedure in the form of remedy created by statute to meet the necessity of draining a considerable district, authorized the court to modify existing orders of confirmation, and thus all drainage districts of the state are placed under continued judicial control, as to those subjects which might originally have been submitted for judicial determination by the report of the commissioners.
7. Said sec. 2, ch. 43, Laws of 1901, relating to mere matters of remedy and procedure, is not unconstitutional because retroactive in effect.
8. An order made under the provisions of sec. 2, ch. 43, Laws of 1901, modifying a final decree in proceedings to create, etc., a drainage district, being within the jurisdiction of the court, and it appearing that the plaintiff had and waived due opportunity to appeal therefrom, he cannot attack the order collaterally by an action to restrain the collection of any tax or assessment authorized by such modified order.
9. Under sec. 1379—24, Stats. 1898, as amended by sec. 6, ch. 43, Laws of 1901, relative to the establishment, etc., of drainage districts (providing that if in the first assessment the commissioners shall have reported to the court a smaller sum than is needed to complete the work or repair . . . a further assessment on the lands benefited, proportioned on the first, shall be made under the order of the court or the presiding judge

thereof without notice), a second assessment without notice is not unconstitutional as a taking of property without due process of law, since such order is but one step in a general scheme or procedure; must be considered in connection with the other parts, and hence notice, at any stage of the proceedings, whereby the property owner has opportunity to be heard as to the apportionment of a share of the burden to him, is sufficient.

10. No error in such modifying order can prejudice the property owner, since the court by its first order has concluded every question upon which he had a right to be heard, and all that could be done by the court or the commissioners, is a mere arithmetical computation of the assessment, for which the presence of the property owner is not necessary.

APPEAL from an order of the circuit court for Juneau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Appeal from order sustaining demurrer to a complaint, from which it appears that in the spring of 1889 proceedings were instituted for the creation of a drainage district under secs. 1379—11 to 1379—31, Stats. 1898, and that, after due notice and appointment of commissioners in accordance with the statute and the necessary report of the commissioners, the court, on January 4, 1900, made its order of confirmation, in which were confirmed assessments so made that they did not become payable until from ten to twenty years in the future, but were to draw interest annually meanwhile, and by said order authorized the issue of bonds payable twenty years thereafter, and drawing interest not to exceed six per cent. After the enactment of the amendment to the sections above mentioned, accomplished by ch. 43, Laws of 1901, upon application by the commissioners and due notice, the court, on May 15, 1901, made an order modifying that of January 4, 1900; such modification being only in certain details, but continuing the theory of the original order, that the assessments should be payable in instalments between ten and twenty years thereafter, and that the bonds authorized should be payable in the same instalments. The amount of such original assessments was approximately $40,000, and the re-

port of the commissioners, confirmed by said orders, declared that the benefits to the lands included in the district exceeded the cost of the improvement. Later, on July 9, 1901, the commissioners presented a petition declaring that an additional amount, exactly equal to the original estimate, to wit, approximately $40,000, was necessary for the completion of the work, and that they had assessed the same upon the same basis as the former assessments. Thereupon, on July 18, 1901, without notice to any parties interested, the court entered order confirming said second assessments, directing that the same fall due in instalments at dates between ten and twenty years thereafter, and draw interest at the rate of six per cent., payable annually, and authorizing the commissioners to issue bonds bearing interest not to exceed that rate, and payable in instalments of the same years as the assessments. The complaint alleged these proceedings illegal and beyond the jurisdiction of the court, and prayed injunction against the drainage district and the commissioners, prohibiting them from taking any steps to collect said assessments, and from issuing said bonds under either of said orders.

*J. T. Dithmar,* for the appellant.

For the respondents there was a brief by *Olin & Butler,* and oral argument by *J. M. Olin.*

Dodge, J. There immediately present themselves upon this complaint three questions, solution of which will render ultimate conclusion easy, and obviate the necessity of examination of very much statutory detail, now become, in some degree at least, obsolete. Those questions are: (1) Is the proceeding under secs. 1379—11 to 1379—31, Stats. 1898, a judicial one, so that it falls within sec. 2594, Stats. 1898? (2) Had the circuit court jurisdiction thereof? (3) If both the foregoing be answered in the affirmative, can the present plaintiff attack or obstruct the decree collaterally?

To the first of these questions an affirmative answer is

*prima facie* indicated at once upon examination of the statute. The only suggestion to the contrary made by the plaintiff is that the laying out of drains and levying and collecting special assessments for the expense thereof, is in its nature either legislative or executive. Doubtless there are cases where functions are thrown, or attempted so to be, upon courts, which cannot be characterized as judicial, where they are made mere implements of one of the other grand divisions of the government; and such functions are sometimes performed by courts without protest—whether properly so, we need not now decide. Notable among such instances are those where the mere appointment of some special commission or tribunal is vested in a court or a judge. In the statutory scheme now under consideration, however, we do not find any such attempt. The sections above referred to provide for an application to the court by petition for certain relief; for notification to all others likely to be affected; for the framing of issues and the trial thereof in an entirely judicial manner by the court, with or without the aid of a jury; for the rendition of decisions upon such various detail questions, and the final entry of a so-called "order," having the characteristics of a most comprehensive decree, based upon the facts as the court shall decide them to be in the light of the law as the court shall construe it. That such order or decree is the culmination of an entirely judicial proceeding we cannot doubt, nor that, as a corollary thereof, it may be enforced by the court rendering it by any or all of those processes inherent in courts of justice. The view that this proceeding is a judicial one has the support of intimations at least from this court and from the courts of Illinois, whence in very large measure, the statutes were adopted. *Bryant v. Robbins,* 70 Wis. 258, 271, 35 N. W. 545; *Muskego v. Drainage Comm'rs,* 78 Wis. 40, 47, 47 N. W. 11; *Riebling v. People,* 145 Ill. 120, 124, 33 N. E. 1090.

That jurisdiction generally over the subject-matter is at-

tempted to be conferred by these statutes cannot be doubted. That such jurisdiction was aroused by the filing of a petition complying at least substantially with those statutes is made plain by the record as set forth in the complaint, and from the same record it is apparent that notice in compliance with that statute was served upon the various persons interested—certainly upon the plaintiff here. Thence results complete jurisdiction of the persons so served. From all these it results by primary legal logic that a decision upon all the facts presented and upon a construction of the law governing the situation, followed by rendition of a final order or decree in accordance with such decision and construction, was also within the jurisdiction of the court. Such conclusion is in no wise controverted by a showing that any facts were decided wrong, or that the law was misconstrued. A remedy deemed by the legislators complete for the correction of any such errors existed in an appeal from the final order. *Tallman v. McCarty,* 11 Wis. 401; *Salisbury v. Chadbourne,* 45 Wis. 74; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 233, 82 N. W. 158.

This view disposes of the contention that the statutes did not, at the time of the original decree, in 1900, permit that the assessments be made payable in the remote future, or that money be borrowed, as here, for a considerable term, to be ultimately repaid out of such postponed assessments. We need not consider whether the statutes could properly be so construed as to authorize these things. If the court having jurisdiction did so construe them, it was a judicial act, none the less binding upon the parties because the construction was wrong.

Appellant, however, urges that the statutes attempting to confer this jurisdiction are void because they accomplish results forbidden by constitutional provisions, either federal or state, namely, that they deprive him of his property without due process of law, and that they make upon him imposi-

tions by special assessments not limited to the amount of his benefits. We think such objections untenable, because no such results are authorized by the statute or accomplished by the proceeding. Clearly, the first of these wrongs does not appear. Due process of law, in the constitutional sense, is satisfied by the giving of notice to the party of a proceeding in which his rights may be affected, together with an opportunity to appear therein and be heard. It is needless to go into the authorities to ascertain how slight a notice or opportunity will satisfy these requirements. Those granted by these statutes and actually conferred in the proceedings are of the fullest and most ample. Before rendition of the decree, plaintiff, in common with other property owners, received two notices and had opportunity to appear in court, offer evidence, and have tried every material question: First, whether a public purpose was to be subserved by the proposed drainage; secondly, whether his land would be specially benefited thereby; thirdly, whether such benefits to the whole drainage district would exceed the cost; and, fourthly, as to the proportion of such cost which ought to fall on his land, considered relatively to all other lands in the district. And in addition to all this he was given opportunity to appeal to the highest judicial tribunal in the state for a review of the decision of the circuit court upon any of these questions. This constituted such ample and complete process of law that the niceties of distinction in that field are not raised for consideration. *Hagar v. Reclamation Dist.* 111 U. S. 701, 4 Sup. Ct. 663; *Baldwin v. Ely,* 66 Wis. 171, 188, 28 N. W. 392.

Neither is there need to consider whether the cost of this work can constitutionally be imposed upon the private property within the drainage district, regardless of actual benefits conferred upon such property, for the statute makes no such attempt. It requires that, before proceeding to assessment, it must be found and decided that such benefits will equal or exceed the amount of the cost, and that behest has

been obeyed. There is therefore no taking of property without compensation, nor excess of the taxing power as limited by the constitution. *Weeks v. Milwaukee,* 10 Wis. 242; *Bond v. Kenosha,* 17 Wis. 284; *Dickson v. Racine,* 61 Wis. 545, 21 N. W. 620.

Having thus reached the conclusion that the order, execution of which is sought to be restrained, is a judicial determination by a court having jurisdiction of the subject-matter and of the parties, we hardly need to state that it cannot be assailed collaterally, except, perhaps, for fraud, of which nothing appears. *Salisbury v. Chadbourne,* 45 Wis. 74; *Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433; *Crist v. Davidson,* 116 Wis. 532, 93 N. W. 532. This salutary rule of general law is re-enforced in its application to the present complaint by sec. 7, ch. 43, Laws of 1901, which prohibits any action to restrain collection of drainage assessments, except the appeal from the order authorizing them, accorded by the same statute.

From the foregoing it must result that the plaintiff could not maintain an action to enjoin either the collection of assessments or the issue of bonds in accordance with the final order made January 4, 1900. But it does appear by the complaint, as appellant urges, that the threatened action by the commissioners is not in exact compliance with that order, but with a modification thereof made by another order, dated April 15, 1901. The difference between the two, however, is slight. Under the first the bonds were to run twenty years, and the assessments were to be payable, one tenth on January 4, 1900, and another tenth annually thereafter. They were to draw no interest until they were so payable, but the amount of the interest on the bonds equaling the assessments in amount was to be levied each year. Under the modifying order, bonds were to fall due, one tenth thereof June 1, 1910, and a like amount annually thereafter. The special assessment was still divided into ten instalments, with annual maturity com-

mencing September 1, 1909, and were to draw interest from the date of the order, April 15, 1901. The order of 1900, being, as we have already said, a final judicial determination, would probably have been beyond the control of the trial court after the expiration of the term at which it was entered; but sec. 2, ch. 43, Laws of 1901, modified sec. 1379—18, Stats. 1898, by providing that the order of confirmation might, "at the same or any subsequent term, . . . be revised, modified, or changed" after notice; also that the commissioners might be permitted to file supplemental report as to any matters properly within the field of the original, and receive direction by order of court thereon. This modification of the statute, if applicable to orders made prior to its enactment, would undoubtedly authorize the slight modifications made by the order of April, 1901. The appellant, however, invokes the rule that statutes should not be read retrospectively, but as merely authorizing modification and amendment of orders thereafter to be entered in drainage proceedings. Doubtless there is a strong presumption against a retrospective purpose in legislation which relates to concrete rights of property. That presumption is, however, very much weaker in the case of statutes merely regulating remedies. That subject was discussed, and authorities collected, in *State ex rel. Davis & S. L. Co. v. Pors,* 107 Wis. 420, 83 N. W. 706. It is obvious that ch. 43, Laws of 1901, is aimed almost wholly at the procedure in the form of remedy created by statute to meet the necessity of draining a considerable district of land. It is an amendment simply of the details of various sections, comprising the general scheme of procedure for effectuating that purpose. It recognizes, among other things, that, as the work progresses, new conditions and circumstances may arise to modify the policy which at first might have seemed advisable, and that, even after the principal work shall have been completed, its highest efficacy may be capable of accomplishment only by some modification or

extension not within the strict limits of the original report and final order. These drainage districts throughout the state, evidently contemplated by this scheme of legislation, are not institutions of a day, but of much permanence and of much importance to the welfare of the state, and to parties whose property is affected thereby. A legislative policy would be quite surprising which intended a classification between drainage districts which had been initiated prior to April, 1901, and those which might come into existence subsequent to that date. While, perhaps, there is no constitutional requirement for uniformity in the government of drainage disricts, the common sense which dictated such a requirement for town and county government would at least suggest its advisability in regulating the government of these drainage districts, which may become very numerous. We should expect, therefore, that any provision with reference to their government would be framed so as to apply to all alike. We find nothing in the language of the amendments adopted in 1901 inconsistent with such a policy. The method of that act was to amend the language of the existing sections so that such words as "the said order of confirmation," and the like, became naturally applicable to any order of confirmation which had been entered in compliance with the section of the statutes; hence those words point more naturally to all orders of confirmation than to any class thereof. There is also, however, a provision of the act of 1901 which very clearly indicates that the legislature contemplated that by its enactment should be affected prior orders, and that is the portion which prescribes the limit of time for appeals. No such limit had previously been fixed by the drainage statutes themselves, but, the right of appeal being given generally, it was open to argument that such time was controlled by the general statutes regulating appeals—either two years, if these final orders were judgments, or thirty days after notice of entry, if they were mere orders. Ch. 43, Laws of 1901, provided that all

orders confirming assessments should be final and conclusive unless appealed from "within thirty days after the entry of such order or within thirty days after this act shall take effect." The last clause was, of course, meaningless, unless it applied to preexisting orders, and we must presume that such was its intent. If the legislature had in contemplation that a part of this act was to control orders then existing, and not to be confined to a class of subsequent orders thereby created, the inference is almost irresistible that similar application of the whole act was within the contemplation of the legislative mind. We are persuaded, therefore, both from the words of the act and from its general policy, that such was the intent of the legislature, and that, to give effect to such intent, we must and do hold that authority was conferred upon the circuit courts to modify existing orders of confirmation, and thus to place all the drainage districts of the state under continued judicial control as to those subjects which might originally have been submitted for judicial determination by the report of the commissioners.

Some question is made of the constitutional power of the legislature to enact a law bearing such construction, but we cannot consider it worthy of serious consideration, at least with reference to mere matters of remedy and procedure such as that now before us. Such subjects have always been held not embarrassed by any of the constitutional prohibitions. *Oshkosh Waterworks Co. v. Oshkosh,* 109 Wis. 208, 85 N. W. 376; *Id.* 187 U. S. 437, 23 Sup. Ct. 234.

The result of these views is, of course, that the order of April, 1901, like the preceding order, was within the jurisdiction of the circuit court, and the plaintiff, having had and waived due opportunity to appeal therefrom, cannot attack the same thus collaterally; hence that the complaint before us fails to show any right in the plaintiff to enjoin or restrain the issue of the bonds or the levy and collection of the assessment authorized by the first two orders.

The additional assessment of approximately $40,000, and the issue of bonds to extend the time of payment thereof, directed by the order of July, 1901, is assailed on the further ground that the procedure taken, which is in accord with the statute, fails to constitute due process of law, in that no notice whatever is required by the statute, or was in fact given, of the application of the commissioners to make such assessment; resulting, as appellant claims, in the taking from him of his property by the collection of assessments, and, in advance thereof, by the imposition of a lien upon his land. The statutory provision is sec. 1379—24, Stats. 1898, as amended by sec. 6, ch. 43, Laws of 1901, and is:

"If in the first assessment the commissioners shall have reported to the court a smaller sum than is needed to complete the work of construction or repair, . . . a further assessment on the lands benefited, proportioned on the first, shall be made under the order of the court or the presiding judge thereof without notice."

We should have little doubt of the cogency of such an objection to a statute which originally authorized an imposition or assessment upon private property without any notice to him whatever, whether the result were to be accomplished by the judgment of a court, or by the decision of some legislative or executive tribunal. This second order, however, and the law authorizing it, are not such. It is at most but one step in a general scheme of procedure, and must be considered in connection with the other parts. It has frequently been held that, even in tax proceedings out of court, notice of each step is by no means essential to due process of law, but that notice at any stage of the proceedings whereby the property owner has opportunity to be heard as to the apportionment of a share of the burden to him is sufficient. *State v. Whittlesey,* 17 Wash. 447, 50 Pac. 119; *Meggett v. Eau Claire,* 81 Wis. 326, 333, 51 N. W. 566; *Hennessy v. Douglas Co.* 99 Wis. 129, 148, 74 N. W. 983; *Davidson v. New Orleans,* 96 U. S. 97. Even more obviously is it competent

for the legislature to dispense with notice of the various steps in a judicial proceeding after jurisdiction over a party has been acquired by due notice of its commencement. He may then be required to keep himself informed of all further steps or action within the limits of the jurisdiction so obtained.

A still further and perhaps stronger reason controls the objection now made, namely, that notice of this additional assessment could have availed plaintiff nothing. Every question upon which he had any right to be heard had already been concluded. The court, by its former order, had established the public purpose, the benefit to plaintiff's land, and the proportion. All that could be done by the commissioners or by the court in making this second assessment was mere arithmetical computation, for which the presence of a property owner was neither necessary nor useful. No error therein could prejudice him. *People ex rel. Barber v. Chapman,* 127 Ill. 387, 19 N. E. 872; *Meggett v. Eau Claire,* 81 Wis. 332, 51 N. W. 566.

For these reasons, we conclude that it was competent for the legislature to authorize this step without further notice, and that the order of July 18, 1901, was also within the jurisdiction of the court, and, like its former orders, impregnable to collateral assault.

The conclusiveness of these several adjudications fully appears from the complaint, and renders all the other facts insufficient to support any action to restrain the execution of those orders or decrees. The demurrer was therefore properly sustained.

*By the Court.*—Order appealed from is affirmed.

PARCHER, Respondent, vs. DUNBAR, Appellant.

*June 1—June 18, 1903.*

***Reference: Powers and duty of referee: Appeal: Findings of trial court, when disturbed: Practice.***

1. **An order of reference directed that the issues in the action be referred to the referee, "to take the testimony and state the account between the parties." *Held*, that such order did not empower the referee to hear, try and determine any part of the issues in the case.**
2. **In such case, where the referee has proceeded to try such issues, and incorporated in his report findings which were beyond the scope of his authority and power under the order, the court can properly disregard such determination and proceed as though the report were properly submitted.**
3. **When the findings of the trial court are well supported by the evidence they cannot be disturbed on appeal.**

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action was commenced by Nellie M. Guenther against the appellant and respondent, as defendants, for an accounting and a partition of lands described in the complaint. In April, 1900, Nellie M. Guenther and *Dunbar* and *Parcher* purchased a tract of timber land. It was agreed that Nellie M. Guenther should have a one-third interest in these lands and the profits from the sales thereof upon payment of one third of the purchase money and one third of all moneys advanced in conducting the business connected with the land and timber; all said sums to draw interest at the rate of ten per cent. per annum. Plaintiff and her husband were to devote all of the time required in managing the land and conducting the lumber business thereon, without charge against the defendants, and were to receive one third of all the receipts the enterprise yielded. The defendants were to provide the money to purchase the lands and conduct the lumbering business. The sums required to carry on the enterprise were furnished equally by them. One third of all such

amounts, with interest, was charged to the planitiff, Guenther, who was credited with one third of the proceeds realized up to the commencement of this action. She alleged in her complaint that the amount realized from this enterprise was sufficient to pay for her one third, with interest, and demanded an accounting. The defendants answered separately and denied her claim.

All matters in difference between the parties have been disposed of by stipulation, except the controversy between appellant and respondent as to three promissory notes hereinafter specified. Before trial, appellant purchased all right, title, and interest in the subject-matter of the action, except the notes taken by them from the North Side Lumber Company for lumber which was obtained from these lands. These notes were dated July 10, 1895, and amounted in the aggregate to $3,239.81. The notes were payable to appellant and respondent. Appellant alleges that he sold his half interest in these notes July 20, 1895, with accrued interest, and he received payment from respondent by check. Respondent denies this claim, and alleges that he received the three notes from appellant as security, upon condition that if they were paid while he so held them the money was to be applied in payment of such advancement, otherwise the loan or advancement was to be paid by the parties. One of the notes for $1,000 and interest was paid at maturity, which amount was applied by respondent on the amount advanced. The remaining two notes were not paid, on account of the insolvency of the North Side Lumber Company.

The case was referred to E. B. Lord, an attorney at law, to take the testimony, state the account between the parties, and report to the court. The referee reports specifically as to the matter in controversy on this appeal:

"That there is a failure of any preponderance of evidence to establish *Mr. Parcher's* [respondent's] contention under his answer in regard to the three notes of the North Side

Lumber Company, which were transferred to him by *Mr. Dunbar* July 20, 1895; and that by such transfer *Mr. Parcher* became the sole and absolute owner of said notes, without any agreement of recourse on the part of *Mr. Dunbar* or the plaintiff."

He found, further, that there is no account to be stated between *Parcher* and *Dunbar,* and that plaintiff's credit of $1,082.03, July 20, 1895, was correct, and should stand. This credit had been given Mrs. Guenther by *Mr. Dunbar,* who kept the books of account with plaintiff. Upon the referee's report the court decided that the notes had not been purchased by respondent, but were the property of plaintiff and defendants *Parcher* and *Dunbar* at the commencement of this action, and that they must bear the loss incident to the failure of their payment. Therefore the court directed a restatement of the account to correspond with the decision, and ordered judgment to be entered accordingly. The referee restated the account pursuant to such direction, which the court approved, and judgment was entered against the appellant and in favor of respondent for the sum of $864.24, without costs. From this judgment he appeals.

For the appellant there was a brief by *E. L. & F. E. Bump,* and oral argument by *E. L. Bump.*

For the respondent there was a brief by *Hurley & Jones,* and oral argument by *M. A. Hurley.*

Siebecker, J. The important question controverted was whether appellant sold to respondent his interest in the three North Side Lumber Company notes. The errors assigned in the record are covered by a determination of this issue. It appears that the court had not determined any of the rights of the parties under the issues before this reference was made. The order of reference directs that the issue in the action be referred to the referee, "to take the testimony and state the account between the parties." This reference clearly did not empower the referee to hear and try the whole issue, or that

he should hear and determine any part of the issue in the case. The plain import of the order of reference is that the referee should take the testimony material to the issue and report thereon his statement of the account between the parties for the information and assistance of the court. The referee could do no more than the order prescribed. Secs. 2864, 2865, Stats. 1898; *Best v. Pike,* 93 Wis. 408, 67 N. W. 697. An inspection of the referee's report discloses the fact that he incorporated findings upon issues which were beyond the scope of his authority and power under the order. He attempted to decide the vital issue of the case involved on this appeal between appellant and respondent. The court, however, was not bound by such determination, and could properly disregard such determination and proceed as though the report were properly submitted. The result is that the basic issues were left to be decided by the court upon the testimony. It proceeded and made its findings of fact and determined the rights of the respective parties. Was the court's finding on the issues between the appellant and respondent as to the sale of these notes contrary to the clear preponderance of the evidence? A careful examination of all the evidence material to this issue leads us to the conclusion that the findings of the court are well supported by the evidence and cannot be disturbed.

A restatement of the account as first reported by the referee necessarily resulted from the difference between the court's findings on the fundamental rights of the parties, and the theory adopted by the referee in stating the account in the first instance as applicable to the parties' rights. This difference in result did not in any respect affect the correctness of the items entering into the account, and it was finally properly stated and approved by the court. We must hold upon the record that no ground exists to disturb the findings and judgment of the trial court.

*By the Court.*—Judgment affirmed.

MALICK, Respondent, vs. KELLOGG and another, Appellants.

*June 2—June 18, 1903.*

*Landlord and tenant: Unlawful detainer: Nonpayment of rent: Pleading: General denial: Admissions: Construction of allegations of answer: Construction of lease: Landlord's breach of covenants.*

1. In an action for unlawful detainer for nonpayment of rent, the answer contained a denial of all allegations of the complaint not therein admitted, but contained no specific admission that defendant was in possession of the premises. The making of the lease was admitted, and the defense was based on the sole ground that the plaintiff had failed to perform certain agreements or conditions which were to be performed after possession was taken, by reason of which the payment of rent was excused or rendered impossible. *Held* that, applying reasonable rules of construction, the allegations of the answer must be construed as admitting defendant's possession of the premises.
2. When a fact is admitted by clear and necessary implication from other facts expressly stated in a pleading, the admission is as effective as though it were expressly stated, and will not be overcome by a mere general denial.
3. The lease of a farm for dairy purposes provided that the lessor should provide pasture for 100 head of cattle and cleared land enough to feed the same, not less than 100 acres. The cleared land was not described. *Held*, that a construction that lessor was obliged to provide an additional 100 acres of cleared land for pasturage was untenable.
4. Where, after the tenant has taken possession, the landlord has failed to perform his agreement to make certain improvements upon the demised premises, such agreement is an independent agreement, not one upon which the right to demand rent depends, and hence is not a defense to an action for unlawful detainer for nonpayment of rent.

APPEAL from an order of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action of unlawful entry and detainer brought to remove tenants for failure to pay rent. The complaint alleges the leasing by written lease of a farm of several hundred acres by the plaintiff to the defendants for a term of five

years from April 22, 1901, upon a rental of $1.25 per month per head of milch cows and sixty-two and one half cents per month per head for heifers kept by the defendants upon the farm, payable at the end of each month. The complaint also alleges the default for several months in the payment of rent and the giving of due notice in writing requiring the payment of rent or the surrender of possession. The material parts of the defendants' answer are as follows:

"They allege that they entered into a certain contract with the plaintiff, a copy of which is hereunto attached, marked 'Exhibit A,' and made a part of this answer. That it was understood, and by said contract is in fact made a condition upon which the rentals in Exhibit A mentioned should become due and payable, that the plaintiff should do and perform certain things in said contract particularly set forth, which conditions to be performed were and are conditions precedent or at least concurrent to any performance of said contract on defendants' part; and these defendants allege that the plaintiff has neglected and failed to perform the said contract on his part, and thereby rendered it impossible for these defendants to perform their part of said contract. That it was absolutely, entirely, and wholly impossible for defendants to pay any rent until the said conditions to be performed by plaintiff were performed, which conditions, as respectfully appears in Exhibit A, are that plaintiff should furnish pasture for 100 head of cows, and at least 100 acres of cleared land, a creamery, and silo, all of which he has not done, and thus has prevented the defendants performing their part of the contract. That the plaintiff is absolutely and completely in default in all of the conditions to be by him performed as specified by Exhibit A. That there is no rent due from these defendants to the said plaintiff. Except as herein admitted, these defendants deny each and every allegation in the complaint."

The contract attached to the answer is dated April 22, 1901, and by its provisions the plaintiff agrees to rent or lease to the defendants for a term of five years the plaintiff's farm in the town of Linwood, Portage county, at $1.25 per month per head of milch cows and sixty-two and one half cents per

month per head of heifers, the same being in lieu of any other charges for rent. The contract then provides for the payment of $875 by the defendants to the plaintiff for thirty-three head of cattle and $625 for horses and tools upon the farm, and also that the defendants are to convey to the plaintiff a certain described farm in Lincoln county for $2,500, the sum of $1,500 thereof to be applied upon said purchase of stock and tools, and the balance paid in cash or its equivalent. The contract then proceeds as follows:

"The total rental of said farm of the party of the first part is to be one and 25-100 dollars per head of milch cows. Said party of the first part is to build a building suitable to be used for a creamery, not larger than 20x30 feet; also to provide pasture for one hundred (100) head of cattle, and cleared land enough to provide feed enough for one hundred (100) head of cattle, not less than one hundred acres. Said party of the second part is to provide himself with one hundred cows within one year from date of this instrument. This lease may be renewed for five years when each party to this agreement is to double the capacity of his part of the agreement. Said party of the second part is to have the privilege of raising calves, pigs and colts, without further charges. Said party of the first part is to build a silo sufficient to provide for ensilage for said one hundred cows, during this present summer of 1901; also to furnish stalling and flooring to the remainder of the present barn. Said party of the first part is to have the right to leave his registered stock on the farm, said party of the second part to keep and provide for them the same as for his own, and pay for the use of the cows the same as for his own, that is, one and 25-100 dollars per month each, each party to this agreement to have one half of the increase. Also the party of the second part is to have the privilege of cutting any down timber for the use of house and creamery fires as long as the down timber lasts or until this lease shall have expired."

A general demurrer to the answer was sustained, and the defendants appeal.

For the appellants the cause was submitted on the brief of *Lamoreux & Park,* attorneys, and *F. J. Smith,* of counsel.

For the respondent there was a brief by *McFarland, Hanna & Murat,* and oral argument by *C. D. McFarland.*

WINSLOW, J. While the answer contains no specific admissions that the defendants are in possession of the demised premises, and while it does contain a denial of all allegations of the complaint not therein admitted, we think that, applying reasonable rules of construction, its allegations must be construed as admitting possession of the premises. The making of the lease is admitted, and the defense is based, not on the ground that possession was not delivered, but on the sole ground that the plaintiff has failed to perform certain agreements or conditions which were to be performed after possession was taken, by reason of which it is alleged that the payment of rent has been excused or rendered impossible. The allegation that no rent is due is evidently but a legal conclusion from the previous facts stated. When a fact is admitted by clear and necessary implication from other facts expressly stated in the pleading, the admission so made is as effective as though it were expressly stated, and will not be overcome by a mere general denial. *Miller v. Larson,* 17 Wis. 624.

The fact of possession of the leased premises being admitted, the question is whether the failure of the plaintiff to perform his agreements constitutes a defense. The farm leased was several hundred acres in extent, and was evidently leased for dairying purposes. The plaintiff agreed to build a creamery, to provide pasture for 100 head of cattle, and cleared land enough to feed the same, not less than 100 acres, and to build a silo sufficient to provide ensilage for said cattle. It seems to us very plain that these agreements were all expected to be performed upon the leased premises, and after the defendants took possession. The claim that the agreement means that the plaintiff was to provide an additional hundred acres of cleared land for pasturage is untenable; we find noth-

ing in the agreement that indicates such an intention. It is unreasonable to suppose that it was the intention to make so large and material an increase in the leasehold estate without describing or locating the land so to be added, or indicating in any clear way that such was the purpose. It is not a case, therefore, of failure to put the tenant in possession of the leased premises, nor of eviction of the tenant from any part of the premises, but simply a case where the landlord has failed to perform his agreement to make certain improvements upon the premises after the tenant takes possession. It cannot be distinguished from a covenant to make repairs during the term. Such an agreement is uniformly held an independent agreement, and not one upon which the right to demand rent depends. *Peterson v. Kreuger,* 67 Minn. 449, 70 N. W. 567; *Phillips v. Port Townsend,* 8 Wash. 529, 36 Pac. 476; Wood, Landlord & T. (2d ed.) 1132, 1133. Were this an action to recover the rent, and were the landlord's breach pleaded as a counterclaim, the question would be entirely different. The demurrer was rightly sustained.

*By the Court.*—Order affirmed.

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HOLMES, Appellant, vs. WALTER and others, Respondents.

*June 2—June 18, 1903.*

*Wills: Construction: Testamentary trusts: Trusts and trustees: Duties of trustee: Statutes: Suspension of power of alienation: Trusts void for uncertainty.*

1. The rule that judicial construction is neither required nor permissible unless uncertainty of sense is clearly apparent applies to wills the same as to other instruments.
2. Where the field of construction is entered upon respecting a will, the rule that a meaning is to be preferred which will support instead of defeat it applies as strongly to testamentary trusts as to any other testamentary disposition of property.

3. When the title to property is conveyed to one for the benefit of another, with active duties to be performed by the grantee with reference to the subject of the conveyance, evidencing an intention that the primary use of the property shall be in the grantee, an active trust is created whether any technical words to that effect are used or not.
4. In the circumstances above instanced, waiving that of the primary use being in the grantee, his duties in respect to the title not requiring the right to the possession and profits to any extent, a passive trust is created as to the title, and a power in trust in respect thereto is vested in the grantee if the duty to be performed may legitimately be the subject of such a power under the statutes.
5. A trust created for the purpose mentioned in subd. 5, sec. 2081, Stats. 1898, is valid if fully expressed and clearly defined upon the face of the instrument creating it, unless the same violates the prohibition against suspending the absolute power of alienation.
6. A purely passive trust is annihilated as soon as created, by the operation of the statute, sec. 2075, Stats. 1898, causing the legal title to vest with the beneficial right.
7. The statute operating upon passive trusts in the manner above indicated does not affect active trusts whether they be valid or invalid. If the former, they are to be executed according to the scheme of the creator thereof; and if invalid the property is entirely unaffected by the instrument and goes under the residuary clause of the will in the absence of any other direction contained therein, and if there be no such residuary clause or direction it goes as intestate estate.
8. A trust is fully expressed and clearly defined within the meaning of the statute when the general purpose thereof is clearly within the statute, the general scheme of the trust is made evident, and the subject of the trust and persons to be benefited are made sufficiently clear that a court of equity can judicially determine the same and superintend the execution of the trust.
9. Where a trust has no express provision for its termination it is not void on that account if it does not offend against the statute as to suspending the absolute power of alienation.
10. The law prohibiting the suspension of the absolute power of alienation does not apply to personal property in any case, and it does not apply to realty where the trustee has the absolute power to sell the same, or where the beneficiaries are all *in esse* and can, by uniting, convey the whole title.

11. When an instrument creating a trust does not in terms or by necessary implication prohibit the termination thereof, if all parties who are or may be interested are in existence and are *sui juris*, they may, by uniting, terminate the trust subject to such restraints as are contained in secs. 2089, 2091, Stats. 1898.
12. The mere fact that no time is stated in the creation of a trust for its termination, does not render it void for uncertainty.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action to construe the will of George Walter, deceased, which, so far as material to the question raised, is in the following language:

"First. After the payment of my just debts and funeral expenses, I give, devise and bequeath to my beloved wife *Mary,* in trust for herself and my children, all of my estates, both real and personal with full power to continue my business if for the best interest of my estate.

"Second. I hereby nominate and appoint my friend John J. Sherman the executor of this my last will and testament," etc.

The testator left surviving the plaintiff, who was his widow, and the following children: *George Walter, Laura L. Roemer, Martin T. Walter, Lena C. Walter, Anna M. Walter, Chas. W. Walter, Henry F. Walter, Rose T. Walter,* and *Edgar B. Walter,* all being minors except one, and properly made defendants. Such proceedings were duly had in the settlement of the estate that the property was assigned in due form to *Mary Walter* in trust, according to the language of the will. She accepted the trust. Subsequently she resigned, and the county court appointed defendant *Christian Walter* in her place. He accepted the trust and took possession of the property. He thereafter managed the same without question of his right in the matter till this action was commenced. Such property consisted mainly of a brewery in operation, and the personal property in and for use in connection there-

with. The value thereof was about $100,000. It was vital to its preservation that the brewery should be kept in continuous operation. It was not susceptible of division by conversion into money. The claim of plaintiff was that no valid trust was created by the will; that by a proper construction of the instrument she took the whole title and beneficial interest in the property. The claim on behalf of the defendants was also that the will did not create a valid trust, though there was an attempt to do so, and that the legal result was to vest the full title to the estate in the mother and children in equal portions.

The court decided as follows, in effect: The testator had no intention of vesting the whole beneficial interest in his estate in his wife. He expected that the harmonious relations theretofore existing in his family would continue. He knew the character of his property was such that the best results for his family could be obtained by operating the same without any divided management. He could not foresee whether it would be for their best interests to keep the property in specie or convert it into money and invest the same, or divide the proceeds at some time in the future. He thought best to leave a choice of courses to his wife and children. He did not leave the matter, however, exclusively to his wife. He directed the business to be continued if thought best. His purpose was that the business should be continued if all agreed to that and such course should seem to be for the best, and that if a decision should be at any time arrived at not to continue the business, the property should be sold and the proceeds reinvested or divided, as might seem best. His idea was that so long as the property should be kept together it would be best to have one of the members dominant in the management thereof. He left the precise details of the trust to be determined by circumstances as they might arise. The purposes of the testator are not set forth with sufficient particularity to satisfy the statute. The will created a mere

passive or dry trust. Therefore it must be considered as if there were no trust at all and the property was given direct to the beneficiaries. Judgment was ordered and rendered accordingly, and the plaintiff appealed.

For the appellant there were briefs by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondents there was a brief by *Humphry Pierce,* attorney for *Walter,* trustee, and the major child of testator, and *Thomas H. Ryan,* guardian *ad litem,* for the minor children of testator, and oral argument by *Mr. Pierce.*

MARSHALL, J. The claim is made by appellant's counsel that no trust was attempted to be created by the will; that the purpose of the testator was to bestow all of his estate upon his wife with full power to do therewith as she might see fit. That idea is urged upon us with much earnestness, and rules for judicial construction are invoked to support it. As we view the will we cannot reach the point where judicial construction is permissible. There is a tendency to commence dealing with testamentary instruments at once and almost as a matter of course upon their coming within the reach of judicial administration, as if construction thereof were necessary, or at least permissible, while the true rule is that construction never begins until uncertainty of sense is pretty clearly apparent. In this case there is no such uncertainty. Any attempt to construe the instrument would involve an effort to put meaning into the words contrary to their plain import, and to create uncertainty instead of the opposite. "I give, devise and bequeath to my beloved wife Mary, in trust for herself and my children, all of my estates," etc., "with full power to continue my business if for the best interest of my estate." What can be plainer than those words as regards the mere intention to create a trust, leaving out of view the question of the validity of the trust for the time being. The devise and bequest of property was not made absolutely to the

trustee, but "for herself and my children." The property was not merely conveyed to the trustee to the use of herself and the children, all to immediately possess and enjoy as primary takers; but it was conveyed to the widow for herself and the children, with full power vested in her to operate the property, or to convert the same and invest the fund in other property in her discretion, she taking, primarily, the use thereof. Every word used in the will is in harmony with the one theory that the testator intended to vest the legal title to the property in the trustee with the fullest discretionary authority over the same, as regards how best to devote it to the purpose of the trust. It was limited only by the words "for herself and my children," plainly indicating that all were to share equally in the benefits of the trust.

Counsel refer to *Davies v. Davies,* 109 Wis. 129, 85 N. W. 201, as if that were an authority for holding that when property is plainly given to one in trust for that one and others, with absolute power of control over the same as regards the manner in which the same shall be managed for the beneficiaries, the element of trust, though technical words in respect thereto be used to express it, may by construction be eliminated. That case is very far from supporting such idea. The Davies will was uncertain to the highest degree susceptible of being made certain by construction. There was no question about that. The difficulty was in reading out of the ambiguous instrument the idea which the testator had in mind when he signed it. The court did not reach the final result by discarding the element of trust. That was retained, and amplified, so to speak, by construction, so as to disclose some reasonable meaning within the legitimate scope of the testator's language. No one, it seems, can read the decision there rendered and gather, legitimately, the impression that if Dr. Davies had left his property to his wife in trust for herself as well as the other objects of his solicitude mentioned in his will, there would have been any difficulty calling for con-

struction as regards the element of trust itself. The court did not say that the doctor failed to create a trust, or did not intend to create one. It held that he did create a trust, but that he intended to make his wife one of the beneficiaries thereof as well as the other persons named as such, though failed to express the purpose so that it could be discovered without the aid of judicial construction. We have no such difficulty here. There is not a circumstance, that we can discover, sufficient to furnish a well-grounded suspicion that the testator did not intend to create a trust. Whereas, in the *Davies Case* the literal sense of the trust clause was broadened, letting in Mrs. Davies as a beneficiary, it appearing to be manifest, under the circumstances, that the testator did not intend to leave her entirely unprovided for and destitute and at the same time impose upon her the duty of administering his estate, which was small, for the benefit of others, here the idea is that we should eliminate altogether the element of trust, though it is clearly expressed, by taking the language of the will literally, to accomplish the disinheritance of all the testator's children, though he had ample property to provide for the wife and his children as well. There construction was successfully invoked to avoid an unnatural meaning. Here it is invoked to create one, as we look at the matter.

Our views so far are in harmony with those of the learned circuit judge as regards whether the testator intended to create an active trust. In an elaborate opinion he pointed out in a general way what the testator purposed doing, all indicating such a trust, winding up with these expressions:

"In any event the business could be conducted, the estate managed, disposed of, its proceeds invested and divided—transactions likely to run through a series of years—with greater convenience and economy, in the name of a single person acting as trustee, than by the ten heirs acting individually, some of them for some years by guardians. Such were very probably some of the considerations *which moved the testator*

*to invest his widow with the entire estate,* 'in trust for herself and my children,' leaving the conditions of the trust to be determined afterwards, in the manner already indicated, as future circumstances should seem to require."

The last clause of the quoted language, looking at the opinion as a whole, must be construed as holding that the testator left to the trustee broad discretionary authority as to how best to execute the trust in order that her administration might be adapted to changing circumstances, a very common feature in a trust created by will for the benefit of the testator's family,—a feature almost necessary to such a trust.

Enough has been said, without going further into a detailed consideration of the learned judge's opinion and decision, to show that he held that the will created a trust of an unmistakably active character. The legal title to the property was, by appropriate terms, vested in the trustee, and she was empowered to control and manage it, as the circuit judge suggests, for the reason, among others, that it was of such a character that the interests of all concerned could be best subserved by avoiding a divided management. The statement of the learned court that the testator intended to vest in his wife the title to the property with power to manage it, is, of course, a distinct decision that he intended to create a trust. It negatives any purpose that the beneficiaries should take the title as tenants in common. Notwithstanding the very active character of the trust thus indicated, the learned circuit judge said that the trust was passive in character. It would not seem necessary to stop to more than suggest that a trust cannot be at the same time both active and passive. If it has presently the essentials of one, that excludes the possibility of its having presently the essentials of the other. The prime requisite of a passive trust is that the trustee is made in form a mere holder of the legal title, the right to the possession and the profits being in another. If there are any active du-

ties for the testator to perform with respect to administering the property, and the primary use be expressly or impliedly, by reason of such active duty, vested in the trustee, the trust is necessarily active and not affected by the statute which would otherwise execute the use and thus vest the legal title in the equitable owner. That rule is elementary. *Strong v. Gordon,* 96 Wis. 476, 71 N. W. 886; *Goodrich v. Milwaukee,* 24 Wis. 422; *Riehl v. Bingenheimer,* 28 Wis. 84; *Sullivan v. Bruhling,* 66 Wis. 472, 29 N. W. 211; 2 Underhill on Wills, § 773; *Bean v. Bowen,* 47 How. Pr. 306; *Thomson v. Thomson,* 55 How. Pr. 494; *Scofield v. St. John,* 65 How. Pr. 292; *Ward v. Ward,* 105 N. Y. 68, 11 N. E. 373; *Bennett v. Garlock,* 79 N. Y. 302. The law in that regard is stated in Perry on Trusts, § 305, thus:

"If any agency, duty, or power be imposed on the trustee, as by limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised, or duty performed by the trustee in applying the rents to a person's maintenance, or in making repairs, or to preserve contingent remainders, or to raise a sum of money, or to dispose of the estate by sale,—in all these, and in other and like cases, the operation of the statute is excluded, and the trusts or uses remain mere equitable estates."

The learned circuit judge reached the conclusion that the trust in question was a simple or passive trust, after deciding that it was an active trust, because, as one of the latter, it was void for uncertainty, using this language: "The words employed to express such trust fail to do so with such certainty and particularity as are necessary under the statutes which govern the subject," referring, of course, to subd. 5, sec. 2081, Stats. 1898, which provides that express trusts may be created "for the beneficial interests of any person or persons, *when such trust is fully expresed and clearly defined* upon the face of the instrument creating it," etc.

It is needless to say that if a person, in attempting to cre-

ate an active trust, fails by reason of the trust not being expressed with sufficient fullness and definiteness, that offers no opportunity for the statute of uses to operate and vest the title to the property involved in the intended beneficiary discharged of the trust. The statute which in a proper case so operates, sec. 2075, Stats. 1898, never concerns active trusts, whether they are valid or invalid. If an attempt is made by will to create such a trust, which fails for want of certainty, the property, instead of vesting in the beneficiary as if the trust were passive in character, will fall into the residuum of the estate and go under the residuary clause of the will, if there be one, otherwise it will go as intestate property. Redfield, Wills, 410, note; Tif. & Bull. Trusts & Trustees, 57, 58. The condition which will render an express trust inoperative and carry the legal with the equitable title direct to the intended beneficiary, is possession and enjoyment by him of the primary use. If there is vested in the trustee, however, some duty to perform, merely as regards the title, which may be performed consistent with that being in the beneficiary subject to performance of such duty, the statute executes the use just the same, merging the legal with the equitable title in the beneficiary, the trust, as a mere power, remaining effective under the statute on the subject of powers. That, however, does not affect this case because it is evident that the trust here concerns more than the mere title, and that the immediate use and possession was not intended to go to the beneficiaries. The primary use of the property was evidently designed to go to the trustee, as the circuit judge held in his opinion and decision. The trust cannot therefore be sustained solely as a power, nor can it be held annihilated by the statute of uses. It is good because it is expressed with sufficient fullness and definiteness to satisfy the statute, or it is void for infirmity in that regard. In the latter case the title must be held to have passed, not to the beneficiaries under the will discharged of the trust, but, as before indicated, to

the heirs of the testator as intestate estate, there being no residuary clause in the will.

The remaining question to be considered is whether the trust is void for uncertainty. The suggestion, in effect contained in the opinion of the learned circuit judge, that the particular manner of executing the trust is not pointed out and that such feature constitutes a fatal infirmity, cannot be sustained. Such matters are commonly left to the discretion of the trustee. The statute, subd. 5, sec. 2081, Stats. 1898, is substantially an enactment of the common law as regards when equity will enforce a trust. It requires that the trust shall be fully expressed and clearly defined upon the face of the instrument creating it, in order that the court may deal with it if necessary. If the trust is so fully expressed and defined, all else may be left to the discretion of the trustee. Failure to fully comprehend and give effect to that has led to many adjudications seemingly controlled by the idea that trusts are things to be avoided if some reasonable ground can be found to do so, instead of being enforced if that can be done consistently with rules of law. The rule that prefers a construction of a will rendering effective an attempt to create a trust to one that will defeat it, and also prefers a construction that will sustain testacy to one that will create intestacy, applies just as strongly to testamentary trusts as to any other testamentary disposition of property. Modern decisions indicate a growing appreciation of the judicial duty to uphold testamentary dispositions of property, made through the medium of trusts, instead of searching for reasons for avoiding them, or dealing with them with any degree of disfavor. Judge REDFIELD, in his work on Wills, vol. 2, p. 385, noted, at the time he treated the subject, that:

"The chief reason why courts, in the later cases, have felt reluctant to admit uncertainty as a ground for avoiding the formal disposition of property, will be found in the very general feeling in all judicial tribunals, whether in this coun-

try or in England, that the earlier decisions upon this point were, many of them, unreasonable and indefensible, and not a few of them verging very closely upon the ludicrous and the absurd."

Courts, as a rule, hold that where there is no indefiniteness of beneficiaries to enforce the trust, and no indefiniteness of subject or object of the trust, the statute is satisfied, because in such circumstances, through its equity powers, the court can effectively deal with the matter. That idea can be found most frequently advanced and applied in respect to public trusts, where the rule of certainty governing private trusts was applied at least as to certainty of beneficiaries. *Webster v. Morris,* 66 Wis. 366, 371, 28 N. W. 353; *McHugh v. McCole,* 97 Wis. 166, 72 N. W. 631. The rule of the English cases as regards when a trust is stated with sufficient definiteness that a court of equity will enforce it, is substantially the rule laid down in the cases cited. It is when the object or purpose and the person are pointed out with fullness and definiteness. All else may properly be left to administrative discretion. *Pierson v. Garnet,* 2 Brown's Ch. 226; *Robinson v. Waddelow,* 8 Sim. 134; *Gloucester v. Wood,* 3 Hare, 131. In *Roe v. Vingut,* 117 N. Y. 204, 22 N. E. 933, it was in effect held that certainty of general scheme, and of the person or persons to be benefited, satisfies the statute. That will be easily recognized as the rule laid down by this court in the cases above cited. PECKHAM, J., said:

"Upon such perusal [of the will], if a general scheme can be found to have been intended and provided for in the instrument, and such general scheme is consistent with the rules of law, and so may be declared valid, it is the duty of courts to effectuate the main purpose of the testatrix."

In that case the court rested from searching for essentials of certainty upon discovering a clear and fully expressed purpose to create a trust, the subject of the trust, the object thereof, and the persons to be benefited. In *Vernon v. Ver-*

*non,* 53 N. Y. 351, it was held that, as regards the object of a trust, it is sufficient if language is used clearly indicating that it is one within the terms of the statute. In *Fosdick v. Hempstead,* 125 N. Y. 581, 26 N. E. 801, a bequest to the town for the benefit of the poor of the town was inferentially held free from uncertainty except as regards the beneficiaries, though the language used to create the trust left the manner of administering the subject thereof wholly to the discretion of the trustee. In *Goodrich v. Milwaukee,* 24 Wis. 422, the trustee was empowered to hold the property for the sole use and benefit of certain persons named, with general powers of administration, somewhat under the direction of one of the beneficiaries. The subject of the trust, the purpose or object, specifying those to be benefited, were stated with fullness and definiteness, but as to many matters of administration the instrument was silent.

Testing the trust in question by what has been said, what is there about it that is not fully expressed and clearly defined? All the essentials of fullness and definiteness are easily discovered. The subject of the trust, the property, is described as all of the estate of the testator, both real and personal. The purpose or object of the trust is likewise clear. It is to enable one person, the trustee, to control, care for and in all things administer the property, and devote the same to the benefit of others. The persons to be benefited are unmistakable, being the widow and all the children of the testator.

It is suggested that the trust is indefinite in that the time when it is to be terminated is not mentioned. The mere fact that no limitation to the existence of the trust is stated is not an element of indefiniteness under the statute since the power of alienation is not unduly suspended. The trustee is empowered to sell the property at any time, so there is no infirmity as regards suspending the absolute power of alienation. If the trust were necessarily perpetual as to the converted fund, that would not offend against any law. *Becker*

*v. Chester,* 115 Wis. 90, 91 N. W. 87, 650. Again, since the will contains no prohibition, express or implied, against terminating the trust, and all parties that can be interested are *in esse,* when all are *sui juris* they can by uniting cause its termination, subject to the restraints contained in secs. 2089 and 2091, Stats. 1898. Perry, Trusts, 920; Lewin, Trusts, 578; *Ruggles v. Tyson,* 104 Wis. 500, 521, 81 N. W. 367; 1 Hilliard, Real Prop. 461; *McWilliams v. Gough,* 116 Wis. 576, 93 N. W. 550. The mere fact that the trust is in terms perpetual does not affect it. That feature is not objectionable so long as it does not offend against the prohibition against suspending the absolute power of alienation. Perry, Trusts, § 23. The books furnish many examples of trusts having the feature under discussion, without a suggestion of the invalidity of the trust on the ground of uncertainty. In *Crockett v. Crockett,* 2 Phill. 553, the property was given to the wife "for herself and children." In *Raikes v. Ward,* 1 Hare, 445, the gift was to the testator's wife "to the intent she may dispose of the same for herself and our children in such manner as she may deem most advantageous." In both cases the claim was made by the children that the will created a joint tenancy, but it was held otherwise, and that their interests were only equitable, the primary taker being a trustee. In *Fosdick v. Hempstead,* 125 N. Y. 581, 26 N. E. 801, as we have before seen, the bequest was general, for the benefit of a class. In *Goodrich v. Milwaukee,* 24 Wis. 422, the same feature characterized the instrument. In *Barnard v. Crossman,* 54 Hun, 53, 7 N. Y. Supp. 275, the terms of the devise were to one to hold for the benefit of his children. The instrument was held to create an active trust. No doubt was suggested as regards the trust being expressed with sufficient fullness and certainty.

Thus it will be seen that, when we put aside as immaterial the suggestion that no time is mentioned in the instrument under consideration for the termination of the trust, and the

suggestion that the manner of administering the trust is not therein definitely prescribed but is left to the discretion of the trustee, and appreciate that all that is necessary to a valid active trust under the statute in respect to fullness and definiteness is that it shall clearly appear to have been created for one of the authorized objects, that the general scheme thereof shall fully appear, that the subject of the trust and the persons to be benefited shall be definitely pointed out, all difficulty in regard to whether the trust in question satisfies the statute vanishes.

The learned counsel for appellant claims that if the trust is to be sustained, as we have indicated that it must be, the appellant is entitled to administer it. That matter does not appear to be before us. The record shows that appellant resigned her position as trustee to the proper county court; and that in due form of law pursuant to sec. 4027, Stats. 1898, such court appointed as her successor *Christian Walter*, and he filed his bond and accepted the trust. That operated, by force of the statute, to vest in him the legal title to the trust property, the same as if his name were inserted in the order of the county court assigning the property to him as trustee in the first instance, in the terms of the will, instead of to appellant.

The result is that the judgment must be reversed and the cause remanded to the trial court with directions to enter a decree establishing the legal title to the property involved in *Christian Walter* as trustee for the appellant and the children of the testator for the purposes mentioned in his will, in harmony with the order of the county court assigning his estate in trust.

*By the Court.*—So ordered. The taxable costs of both parties in this court will be paid out of the trust estate.

## FISHER, Respondent, vs. HERRMANN, Appellant.

*June 3—June 18, 1903.*

***Fraudulent conveyances: Sale of stock of merchandise in bulk:* Bona fides: *Evidence: Presumptions.***

1. Sec. 2310, Stats. 1898, provides that every sale of goods and chattels, unless accompanied by an immediate delivery and followed by actual and continued possession of the things sold, shall be presumed fraudulent as against the creditors of the vendor, and shall be conclusive evidence of fraud, unless it shall be made to appear that the sale was made in good faith and without any intent to defraud such creditors. In an action of replevin it appeared, among other things, that, on purchasing a stock of goods at a private sale under a chattel mortgage, plaintiff discovered the existence of another mortgage lien on the stock, which, together with another sum for which an attachment had been issued and levy made, he satisfied by authority of the mortgagor, paying the balance of the purchase money to the seller. Prior to this payment to the seller, plaintiff had no knowledge concerning the seller's indebtedness aside from these claims, or concerning his financial situation. The next day plaintiff took possession of the stock and building, exercising all the rights of ownership, opened up business to make sales, and employed the seller to assist him in reopening the store and conducting the business. There was no evidence that the seller thereafter exercised any control over the stock as owner. *Held*, that the facts did not establish that fraud or bad motive infected the transaction, but, on the contrary, that the delivery of the stock to plaintiff, and his possession, were in good faith.
2. Under ch. 463, Laws of 1901 (sec. 2317*b*, Stats. 1898), providing that "the sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be presumed to be fraudulent and void as against the creditors of the seller, unless the seller and purchaser at least five days before the sale notify, or cause to be notified, personally or by registered mail, each of the seller's creditors whom the purchaser has knowledge of, or can with the exercise of reasonable diligence, acquire knowledge, of said proposed sale." *Held*, where there was an entire want of such notice to creditors, that the trans-

action is open to explanation, and the fraud presumed may be effectually repelled by the *bona fides* of the transaction.

3. In an action to test the *bona fides* of a sale in bulk of a stock of merchandise, where there had been no compliance with ch. 463, Laws of 1901, the court found, upon the proofs, that defendant had paid full value for the merchandise; that he made search of the records for mortgages and other liens thereon; that he paid all claims discovered by him by authority of the seller, and turned over a small balance of the consideration to the seller, having no knowledge that the seller had any other creditors, nor any information concerning the seller's property aside from the stock of merchandise. The evidence further showed, among other things, that defendant took possession of the stock the next day after completing the purchase, exercised all the rights of ownership, opened up business to make sales, and employed the seller to assist him in re-opening the store and conducting the business. There was no evidence that the seller thereafter exercised any control over the stock as owner. *Held*, that such facts were sufficient to show that plaintiff acted with ordinary care, and to rebut the legal presumption of fraud predicated on want of notice to creditors.

[4. The constitutionality of ch. 463, Laws of 1901, not being questioned on the oral argument, nor presented in briefs of counsel, the court expresses no opinion on that subject.]

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Action of replevin commenced in justice court to recover a stock of merchandise held by defendant as sheriff under writ of attachment. James Croak was a merchant at New London, October 4, 1902. His stock of merchandise was taken by a mortgagee under chattel mortgage, and advertised for sale October 17, 1902. Plaintiff purchased the stock October 7th for $525, and took possession October 8th. In making the purchase he dealt with one Walsh, an officer in possession of the stock under the mortgage, who had authority from Croak to make a private sale. Plaintiff made inspection of the city records, and found another mortgage lien against the stock. Under authority of Croak he paid the mortgage debts, amounting to $321.40, and $65.45 on a claim on

which an attachment had been issued and levy made on the goods. The balance, $138.15, was paid to Mr. Croak. Prior to this payment, plaintiff had no knowledge concerning Croak's indebtedness aside from these claims, nor any information concerning his financial situation. This action was begun on the day after plaintiff took possession of the stock. In the replevin action, under which defendant held the stock, it was charged that the sale to plaintiff was fraudulent and void as to creditors. Upon appeal, the action was tried before the court without a jury. It found in favor of plaintiff, and awarded judgment for the return of the goods, or, in default, to recover the value, and for $6.28 damages and costs. From this judgment defendant appeals.

For the appellant there was a brief by *Weed & Van Doren,* and oral argument by *R. N. Van Doren.*

For the respondent there was a brief by *Chas. A. Holmes,* attorney, and *Lamoreux & Park,* of counsel, and oral argument by *Mr. Holmes.*

SIEBECKER, J. The first ground of error assigns that the sale from Croak to the plaintiff was fraudulent and void as against Croak's creditors, mainly upon the ground that such sale was not accompanied by immediate delivery and change of possession of the goods. An examination of the testimony discloses that plaintiff took possession of the goods immediately after the mortgage and attachment claims had been paid, the day after the purchase; that the mortgage and the attachment claims were satisfied by the authority of Croak, and the stock and the possession of the building was delivered to the plaintiff, who exercised all the rights of ownership, and opened up business to make sales. Croak was employed by plaintiff to assist him in reopening the store and conducting the business. Nothing appears that Mr. Croak exercised any control over the stock as owner, but that he merely as-

sisted plaintiff in reopening the business. These facts are practically uncontradicted, and they must be given their natural and ordinary significance under the circumstances presented. The evidence supports the conclusion that the amount paid by plaintiff for the stock was its full market value. These facts do not establish that fraud infected the transaction, as claimed, under sec. 2310, Stats. 1898. The evidence fails to indicate any bad motive in the transaction. It shows that plaintiff paid full value for the goods, and that the delivery thereof and his possession were in good faith.

It is, however, asserted that the sale must be held fraudulent as against creditors of the vendor under the provisions of sec. 2317*b*, Stats. 1898, as enacted by ch. 463, Laws of 1901, which provides:

"The sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be presumed to be fraudulent and void as against the creditors of the seller, unless the seller and purchaser at least five days before the sale notify, or cause to be notified, personally or by registered mail, each of the seller's creditors whom the purchaser has knowledge of, or can, with the exercise of reasonable diligence, acquire knowledge, of said proposed sale. Except as expressly provided, nothing herein contained shall affect or change present rules of evidence or presumptions of law."

This is a new section, by which it is evidently sought to impose restraints upon the class of dealers comprehended by its terms from perpetrating frauds against their creditors. To accomplish that object, the legislature has imposed upon all such dealers and persons negotiating with them for the sale of any portion or all of their stock of merchandise, otherwise than in the ordinary course of trade, the burden of notifying the seller's creditors of whom the purchaser had actual knowledge, or of whom he could acquire knowledge by reasonable

diligence within five days; and, unless this notice is given, the sale shall be presumed to be fraudulent and void as against such creditors.

It is contended that the statute intends such want of notice to creditors of whom the purchaser had knowledge, or by the exercise of reasonable diligence could have acquired knowledge, to be conclusive evidence of fraud—that is, make a sale under such circumstances absolutely fraudulent and void. The terms of this statute, bearing in mind the object sought to be accomplished—to suppress fraud in the sale of merchandise in the particular manner covered by the act—make it the same in purpose and principle as sec. 2310, Stats. 1898, pertaining to fraudulent conveyances and contracts. The interpretation placed upon the latter section by this court will therefore be helpful and suggestive in correctly interpreting and applying the provisions of this recent enactment. The terms of sec. 2310 analogous to those of this section declare such a sale fraudulent and void as to creditors, unless it be accomplished by an immediate delivery, and followed by an actual continued change of possession. These provisions have been construed, and considered in many cases wherein it is held that the continued possession of the property after such sale is only *prima facie* evidence of fraud, and may be explained by the parties, and the presumptions of fraud arising therefrom be rebutted by showing it was made without any intent to hinder, delay, or defraud creditors and subsequent purchasers in good faith. When good faith has been shown, this presumption of fraud, under the particular terms of the statute, is held to have been rebutted and fully overcome and the sale proved valid. *Whitney v. State Bank,* 7 Wis. 620; *Cook v. Van Horne,* 76 Wis. 520, 44 N. W. 767; *Michelstetter v. Weiner,* 82 Wis. 298, 52 N. W. 435; *Densmore C. Co. v. Shong,* 98 Wis. 380, 74 N. W. 114; *Rindskopf v. Myers,* 87 Wis. 80, 57 N. W. 967; *Missinskie v. McMurdo,* 107 Wis. 578, 83 N. W. 758. The terms of sec. 2317*b*

are that a sale of property covered by it "shall be presumed to be fraudulent and void as against the creditors of the seller," unless the seller and purchaser notify, or cause to be notified, the seller's creditors of which the seller has notice, or by reasonable diligence can acquire knowledge of, personally or by mail, of the proposed sale. Want of such notice to the seller's creditors of whom the purchaser had notice, or could have acquired knowledge by reasonable diligence, is thereby declared of itself a circumstance of fraud; yet it is not to be conclusive, but only presumptive, of the fact of fraud. This import of the terms of the statute necessarily implies, though there is a want of notice to creditors, the transaction must be held open to explanation, and the fraud presumed may be effectually repelled by the *bona fides* of the transaction. The terms of the statute are in their nature strict and severe when applied to ordinary business transactions. They should not be held to imply conclusively that such transactions are infected with bad faith when the parties are actuated by fair and honest motives. This, in effect, accords with the provisions of sec. 2323, Stats. 1898, pertaining to fraudulent conveyances and contracts, declaring that the fact of fraudulent intent in such transactions is to be determined as a fact by the jury, or an inference of law by the court, upon all the facts and circumstances of the case. *Whitney v. State Bank, supra; Michelstetter v. Weiner, supra; Rindskopf v. Myers, supra; Norwegian P. Co. v. Hanthorn,* 71 Wis. 529, 37 N. W. 825; *Erdall v. Atwood,* 79 Wis. 1, 47 N. W. 1124; *Bleiler v. Moore,* 94 Wis. 385, 69 N. W. 164.

The question, then, arises, Does the evidence establish the facts required by sec. 2317*b* to repel the legal presumption of fraud raised by the want of notice by plaintiff to the seller's creditors? The trial court found upon the proofs that plaintiff paid full value for the merchandise; that he made search of the records for mortgages, and as to other liens on the stock; that he paid all claims discovered by him by authority

of the seller, and turned over a small balance of the consideration, having no knowledge that the seller had other creditors, nor any information concerning the seller's property aside from this stock of merchandise. These facts, in connection with all the circumstances of the transaction, are sufficient to show that plaintiff acted with ordinary care, and they rebut the legal presumption of fraud predicated on the want of notice to other creditors. These conclusions dispose of the questions upon this appeal. The validity of ch. 463, Laws of 1901, now sec. 2317*b*, Stats. 1898, was not questioned on the argument, nor is it presented in the briefs of counsel. We do not, therefore, consider that the question of its validity is before us for determination, and therefore express no opinion on the subject.

*By the Court.*—Judgment affirmed.

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STATE EX REL. PATTISON, Respondent, vs. POLLEY and others, Appellants.

*June 3—June 18, 1903.*

**Judgment affirmed upon an equal division of the justices of this court participating in the decision.**

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

*H. W. Chynoweth* and *S. H. Watson,* for the appellants.

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *H. H. Thomas.*

WINSLOW, J. This is an action of *certiorari* brought against the village board of the village of Lodi for the purpose of reversing the action of the board in allowing certain

bills presented by E. G. Fellows and S. H. Watson. It appears by the return that Fellows was marshal of the village and on the 4th of July, 1900, attempted to arrest the relator for violation of an ordinance of the village, and was thereafter sued by *Pattison* for assault in making such arrest; that the village board employed Watson as attorney to defend Fellows in said action, and that he did defend him successfully; and that the bills allowed were for Watson's services and disbursements in making such defense, and for amounts necessarily paid by Fellows for witness fees upon the trial. Upon these facts the circuit court concluded that the village of Lodi was not interested in the action of *Pattison v. Fellows,* and could not legally appropriate the moneys of the village to pay the expenses thereof, and reversed the action of the village board allowing the claims, and the village board appealed. Mr. Justice SIEBECKER, having decided the case while upon the circuit bench, could not participate in the consideration thereof in this court. Upon consultation of the remaining justices it appears, after full consideration, that two are of opinion that the judgment should be affirmed, while two are of opinion that it should be reversed. This being the situation, affirmance necessarily follows.

*By the Court.*—Judgment affirmed.

SIEBECKER, J., took no part.

STATE EX REL. BATZ and others, Appellant, vs. LEWIS, Village Clerk, Respondent.

*June 3—June 18, 1903.*

*Taxation: Banks and banking: Partnership: Unincorporated banking associations: Capital: Capital stock: Real estate as capital:* Certiorari: *Description of intangible property on assessment roll.*

1. Sec. 1034, Stats. 1898, provides that all property in the state, except such as is expressly exempt by law, is required to be taxed. Sec. 1038 covers all exemptions, and contains nothing applicable to the property in question in this action. Sec. 1042 provides that all the stock of every bank or banking association, and all the capital stock of every person, association or other corporation whatever engaged in the business of banking, shall be assessed and taxed in the county and assessment district where such bank or banking association, or where such person, association or corporation is located for the transaction of business. Sec. 1044 provides that bank stock shall be entered in the names of the holders of the several shares thereof respectively. *Held:*

   (a) That said statutes put all property used in banking business, whether represented by shares in a corporation or rights in an unincorporated association, on the same basis.

   (b) That the interests of the members of an unincorporated association engaged in banking, in the capital contributed for such business, are taxable as capital or capital stock to them respectively.

   (c) That the legislative purpose was to regard all property used in banking business as a subject for taxation in its intangible form, and to make the situs thereof, for such purpose, that of the place where the banking business is conducted.

   (d) That the fact that the capital of such an unincorporated association engaged in banking consists of real property, and was taxed as such to the association, does not affect the question of its being taxable in its intangible form to the members of such association.

2. The fact that a resolution adopted by a board of review provided for the assessment of the "capital stock" of a banking partnership, while the assessment, as entered, described the property as "capital," is not ground for vacating the assess-

ment on *certiorari*, since the writ reaches only the judgment of the board, not the manner of executing it.

3. Since sec. 1044, Stats. 1898, deals wholly with intangible rights, it is permissible to refer to them as shares of stock, capital stock, or capital, and hence it is immaterial which of these terms is used in an assessment of the interests of members in an unincorporated banking association, as entered on the assessment roll.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

In 1901 the relators were engaged as copartners in the business of banking in the village of Sun Prairie, Wisconsin. The assessor for such village in such year valued the personal property of the association subject to taxation, consisting of mortgages, accounts, credits, bonds, notes, and other securities, at $24,000, and their other personal property, consisting of bank fixtures and furniture, at $1,000. Due application was thereafter made to the board of review to reduce such assessment, and in support thereof J. M. Batz, cashier, was sworn and testified before the board, in effect, thus: The assets of the association consisted of furniture, fixtures and bills and accounts receivable, and exceeded the liabilities to depositors by $2,116.17. The association is unincorporated. It has an unincumbered capital of $25,000, consisting of real estate. It has no cash capital. The partnership business is carried on under an arrangement in respect to capital whereby each member contributed real estate in that regard to the amount of $8,333.33. One put in two stores, the bank building and a dwelling house in the village, one part of his farm in the town of Bristol, and the other land in the town of Sun Prairie. A deed was made by each and all were delivered to the cashier. One deed was not completed by reason of the incapacity of the grantor's wife to execute the same. The bank capital is unimpaired. The cashier's evidence was corroborated by that of a member of the association. After such evidence was taken, notice of the intention of the board

to assess the capital stock of the bank was waived. Thereafter the board adopted a resolution for the assessment of the capital stock of the bank, valued, as stated in the evidence, at $25,000, to the individual members of the association, $8,333.34 to *George P. Batz,* $8,333.33 to *Peter Batz,* and a like sum to *Erhard Batz.* The prior assessment of the property of the bank, of $24,000 and $1,000, was then on motion released. Thereafter the board caused to be entered upon the assessment roll as capital of the association assessments corresponding to the resolution aforesaid, except that the property was called capital. Such proceedings were thereafter had that such action was duly presented upon a writ of *certiorari* to the circuit court for review, where, upon a hearing duly had, it was affirmed.

*K. K. Kennan,* for the appellant.

For the respondent there was a brief by *Buell & Hanks,* and oral argument by *C. E. Buell.*

MARSHALL, J. The appeal presents for consideration this question: Are the interests of the members of an unincorporated association engaged in the business of banking, in the capital contributed for such business, taxable as capital or capital stock to them respectively, at the place where such business is conducted? The learned trial court held in the affirmative. The answer must be read out of the statutes.

By sec. 1034, Stats. 1898, all property in the state, except such as is expressly exempted by law, is required to be taxed. Sec. 1038, Id., covers all exemptions. It contains nothing applicable to the property in question.

Subd. 9 thereof provides that, "Stock in any corporation in this state which is required to pay taxes upon its property in the same manner as individuals," shall be exempt from taxation. It might be argued therefrom that, inferentially, the capital of a banking corporation, using the term "capital" in respect to property paid in upon subscriptions to capital

stock, distinct from the stock itself, is exempt from taxation. But we are not dealing with corporate property, so need not discuss that subject.

Sec. 1042, Id., provides that, "All the stock of every bank or banking association . . . and all the capital stock of every person, association or other corporation whatever engaged in the business of banking, . . . shall be assessed and taxed in the county and assessment district where such bank or banking association or where such person, association or corporation is located for the transaction of business." That clearly puts all property used in banking business, whether represented by shares in a corporation or rights in an unincorporated association, on the same basis. While the property in its tangible form is regarded as that of the corporation or association, at the same time it has an intangible form in which it is owned by individuals and is subject to be valued and taxed. In case of a corporation that form is the shares of stock. In an unincorporated association the intangible form consists of rights having no specific evidentiary form, though equivalent to shares of stock. What the term "capital stock" means in a technical sense, as regards corporations, does not control and need not be discussed. It is sufficient for this case to determine in what sense it was used in those sections of the statute material to the decision.

Sec. 1044, Stats. 1898, provides that, "Bank stock shall be entered in the names of the holders of the several shares thereof respectively." The meaning of that seems unmistakable. If it were necessary to resort to judicial construction or the history of the legislation to discover the same, it would not be difficult to demonstrate, as suggested by the revisors, that the section was put in its present form for the very purpose of placing owners of stock in banking corporations, and owners of shares in other corporations, or rights in associations engaged in the banking business as regards capital in such business, upon the same basis. It will be seen that shares

in a banking corporation are made taxable to the owners thereof at the place where the bank is located, and that the language to that effect is followed by other language making capital stock of every other person, association or corporation engaged in banking business, taxable in the same way, the individual ownerships in every case to be entered upon the assessment and tax rolls in the names of such owners respectively. Thus, as to banking corporations, the term "stock" is used in its technical sense. As to other corporations and persons engaged in banking business the term refers to rights in property equivalent to rights represented by shares of stock in a corporation. That is to say, a given interest in the capital of an unincorporated association engaged in banking business is placed on the same basis as if the association were incorporated and such interest were represented by shares of stock therein.

It seems that, without going further, we have sufficiently demonstrated that the question submitted for decision must be decided in the affirmative. The suggestions urged in support of the contrary view, that appellants were not incorporated and therefore had no capital stock to be taxed, and that the board should have assessed whatever property the association owned to the association by name, are answered in the plain terms of the statute. The legislative purpose was to regard all property used in the banking business as a subject for taxation in its intangible form, and to make the situs thereof, for such purpose, that of the place where the banking business is conducted. The fact that the capital of the association in question consisted of real property, and the further fact, if it be a fact, that it was taxed as such to the association, does not affect the question before us. If the capital of the association, whether consisting of realty or other property distinct from the rights of the individual members thereof therein, is exempt from taxation, that can be dealt with when reached. Certainly, the legislature can, if it sees fit, treat a mere right

in property, the title to and possession of which stand pledged as a basis for a particular business, as a proper subject for taxation, when such right represents an interest in tangible things owned by an unincorporated association just as legitimately as when it is representative of property in specie owned by a corporation and evidenced by shares of stock. A right in the latter form is a thing of value subject to be bought and sold independently of the corporeal things possessed by the corporation. A right in the former may, to a large degree, be treated in the same way. In case of a corporation the title to the tangible things is vested in it, while the intangible rights are property in and of themselves vested in the members of the corporation respectively, and the same is true of an unincorporated association. A situs can be given by law for the purposes of taxation in the one case as well as in the other.

The point is made that the board of review resolved that the interests of appellants in the banking association should be assessed to them respectively as capital stock, and that the assessment was in fact made as capital. There are two answers to that. First, the writ of *certiorari* reached only the judgment of the board, not the manner in which it was executed. Such judgment followed the exact wording of the statute requiring the interests of the members of the association in its capital stock to be assessed to them respectively. Second. The term used by the board and that used in assessing the property, in the light of the statute, are synonymous, though technically speaking they are not. Strictly speaking, capital stock in a corporation or association is quite different from capital of either, the one referring to the tangible, and the other to rights in property evidenced, in case of a corporation, by certificates of stock. But the terms are used interchangeably and synonymously in laws and decisions. Thompson, Corporations, § 1060. The term "capital" as accurately described the intangible property rights of appellants

in property of the association, as the term "capital stock." It seems obvious that sec. 1044, Stats. 1898, deals wholly with intangible rights and that it is permissible to refer to them either as shares of stock, capital stock, or shares of capital, or capital.

*By the Court.*—The judgment is affirmed.

SIEBECKER, J., took no part.

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JOHNSON, Appellant, vs. STOUGHTON WAGON COMPANY, Respondent.

SAME, Respondent, vs. SAME, Appellant.

*June 4—June 18, 1903.*

*Corporations: Managing officer: Duties and liabilities: Master and servant: Contract of employment for "full time:" Ambiguity: Negligence of officer: Collection of claims: Equity: Accounting: Agency.*

1. The managing officer of a corporation owes to the corporation the duty of absolute good faith, and such diligence, judgment and exertion as the ordinarily capable, diligent, and prudent man would give under like circumstances.
2. Among such circumstances are the character of the service to be rendered, the conditions under which it was compelled or expected to be performed, the means therefor, or which were within the officer's power, and the extent to which attention to detail was consistent with proper consideration and direction of the more important general policy.
3. An agreement with a corporation by a managing officer "to give his full time to the company's service" is, in its nature, ambiguous, and does not require twenty-four hours a day of the officer's time, nor, indeed, every moment of his waking hours, but it does require that he shall make the employment his business, to the exclusion of another business such as usually calls for the substantial part of a manager's time or attention.
4. Plaintiff, as managing officer of defendant corporation, agreed "to give his full time to the company's service." He had pre-

viously been in business as a merchant, which he gave up. He devoted his entire business days, of approximately nine hours, persistently to the defendant corporation, and, in addition, spent approximately one half of his evenings in devotion thereto. *Held*, that the trial court was justified in finding that the evidence did not sustain an allegation of failure to devote his full time to defendant corporation, although, at the same time, he looked after his mother's estate, the financing of another corporation, and occupied a place on the directory of a bank, there being no evidence of pecuniary loss to defendant therefrom.

5. Plaintiff, the managing officer of defendant corporation, on learning that the secretary had allowed another corporation to become a large debtor, called upon the book-keeping department of defendant to furnish him a statement of the amount of that debt, and promptly collected the amount so shown. *Held*, that no negligence on the part of the managing officer was thereby shown, although the debt was larger by reason of interest charges not shown by such statement.

6. Where the managing officer of a corporation secured loans of money to it through his personal connections, at the same rate of interest at which he permitted his mother's estate to borrow money from the corporation, he is not liable for a failure to collect interest from the estate at the rate which the corporation was then paying for money at a bank; there being no showing that the amount of money received through the manager's personal efforts was not equal to the amount loaned to the estate.

7. Where the managing officer of a corporation directed the secretary to collect an overdue amount against a corporation in which the manager was interested, and the secretary reported the amount had been assumed by an entirely responsible person, who afterward repudiated the alleged transaction, and entries were made on the books in accordance with the secretary's statement, it was not negligence on the manager's part to omit to discredit the secretary's statement, and investigate the facts as to the alleged assumption of such debt.

8. Where the managing officer of a corporation did not discover that its secretary had been withdrawing funds in excess of his salary until this had been going on for seven years, and then permitted the secretary to remain in office for several months and appropriate more funds, under the belief that he might reform and reduce his overdrafts, it is within the judgment of the trial court, in drawing inferences of fact, to hold that the ordinarily diligent man, in the managing officer's position,

would have discovered the depletion of the corporation's funds long before it was done, and supports a conclusion that the whole amount of the overdrafts was damage resulting from the manager's neglect to discover it in proper time, for which he was liable to the corporation.

9. The secretary of a corporation, on the day he was discharged, entered upon the corporation books a certain sum stated to be a number of turned accounts, viz: where the secretary had receipted the accounts of debtors to the corporation in consideration of the discharge of his own indebtedness to such debtors. The items composing such sum were not in evidence, were not entered on the books, and it did not appear that the managing officer of the corporation ever had any knowledge thereof, or information of any fact in regard thereto to put him upon inquiry. *Held*, that there was nothing of negligence on the manager's part to which can be ascribed the loss to the corporation of those particular accounts, if they were lost.

10. In such case, the fact that the debtors of the corporation gave as consideration only a cancellation of the secretary's personal liability to them, charged them in the fullest manner with notice of his breach of duty as an agent, and they remained, as before, the debtors of the corporation.

APPEALS from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed on plaintiff's appeal.*

From some time prior to 1889 the defendant was a corporation engaged in the manufacture of wagons at Stoughton, built on the ruins of a previous business. In February, 1891, the plaintiff was elected president and treasurer at a salary of $1,000 a year, at which time a resolution was adopted that he should devote his full time to the service of the corporation. In 1893 he was elected superintendent. Amongst the duties of treasurer prescribed by the articles of incorporation, the treasurer was required to keep the moneys, notes, bills receivable, and securities of the corporation, collect all debts due it, disburse its moneys, and keep correct accounts of moneys, and business transacted by him for the corporation. As superintendent, his duties were not defined, but were those of a detail superintendent of the manufacturing

branch of the business, in which were employed from 120 to 170 men. By virtue of all three offices, he had general supervision and control of the entire business of the corporation, as he testifies. He continued to hold all three offices up to March, 1901. During a good share of the time he advanced moneys to the corporation, and allowed his salary to remain undrawn, so that there was a credit balance amounting at the time of his retirement to $3,436.63, increased by interest to the time of the judgment to the sum of $3,630.37. He brought suit for this balance. The defendant, admitting the holding of the offices and the agreed salary during the periods named, set up by way of defense a counterclaim that plaintiff did not devote his entire time, but engaged in several other enterprises. First, that he at all times was manager of the Johnson estate, of some $75,000, apparently owned by his mother; that from about 1892 he was a stockholder to the extent of $500 in, and president of, the Stoughton Electric Light Company, to which, however, according to the findings, he gave no specific attention; that he was both before and after his employment a partner in a large clothing store, under the firm name of Johnson & Melaas, to which, however, after his employment, the court finds he devoted no business time, but, on the contrary, paid his partner a compensation by reason of his nonattendance thereto; also that from 1897 to 1899 he became interested in a business of manufacturing sadirons, to which he gave considerable business time. The evidence discloses and the court finds that he was only interested in protecting the treasury of said business, which belonged to his brother, and for that purpose received its moneys, and drew the checks and drafts for its disbursements, Also it was asserted that he accepted the vice presidency of the First National Bank of Stoughton in 1899, but the evidence shows plainly that he devoted no attention to the affairs of the bank, except to attend directors' meetings at intervals of from one to three months, and that, as a considera-

tion of his accepting the position, he was given the privilege, on behalf of the defendant, of drawing its drafts without exchange, resulting in a gain of some hundreds of dollars to that company. The counterclaim was based further upon the allegation that he permitted the business of the electric light company to be conducted in the office of the defendant by the secretary thereof, who was also secretary of the electric light company, and that thereby services of employees of the defendant were diverted to its damage, but, more especially, that during that period the electric light company was allowed to largely overdraw, and that in settlement therewith it was charged only straight annual six per cent. interest, whereas the company was during a part of that time paying eight per cent. to the bank, compounded at four-month periods, and during the remainder six per cent., compounded at like periods. The court found that plaintiff had no knowledge of the fact of overdraft by the electric light company until about August, 1895, when it had reached something over $7,000; that thereupon he called on the bookkeeping department for information as to the amount due, inclusive of interest on the overdraft, and upon the information so furnished he immediately forced settlement and payment; that the amount of interest so collected was some $600 less than the electric light company ought to have paid the defendant, but that loss therein was not chargeable to the negligence of the plaintiff. Another ground of counterclaim was that a certain cash register company, in which plaintiff was a small stockholder, was allowed to become indebted to the defendant for various articles sold it, and that the amount of such indebtedness was not collected while that company was solvent, and was finally lost upon its insolvency. The facts disclosed were that the plaintiff, finding an account against this company amongst the overdue accounts, directed the secretary to enforce its collection. The secretary went ostensibly to do so, and came back and entered the account as paid, and charged

the amount thereof to one Olson—an entirely responsible person—claiming that he had assumed it. It thus remained on the books of the defendant until after the cash register company had become insolvent, when Olson repudiated his assumption of the debt and it never was collected. The court found that this loss did not occur through negligence of the plaintiff; he having no knowledge but that the account was paid, as the book entries indicated. Another item of counterclaim was the contention that plaintiff allowed the estate of which he was the manager at times to overdraw its accounts with the defendant to considerable amounts, and charged it only six per cent. interest. It appeared that while bank interest was eight per cent. during the first year or two of his incumbency, and six per cent. thereafter, he was, on behalf of the company, at all times borrowing considerable amounts at a straight rate of six per cent., of which at least a part was furnished by himself. The court found him under no liability for difference of interest upon the overdraft of the estate. Another element of counterclaim was upon permitting the secretary, Lund, to persistently overdraw his account, such overdraft increasing from year to year until September, 1897, when it reached the amount of approximately $3,000, after which the secretary was still retained, under a promise to apply part of his salary toward reducing this overdraft; but, failing to do so, and, on the contrary, increasing it several hundred dollars, he was discharged in February, 1898, when the overdraft upon the books had reached the amount of about $3,100, plus notes of the amount of about $500 which he had from time to time given to the company and credited against his overdraft. At the time of his discharge, Lund added to this account a charge of $409.70 for what are called "turned accounts," namely, accounts owing to the company which he had receipted in consideration of the discharge of indebtedness due from him to such several debtors of the defendant. The court found that while the plaintiff had been

ignorant of this overdraft up to September, 1897, he had been negligent in allowing it to continue and grow, and, as Lund was entirely irresponsible and insolvent, held that the company had been damaged in the amount appearing on the ledger, with interest from the commencement of the overdraft; also for the $409.70 of turned accounts; also for the amount of the notes which Lund had given, together with interest thereon; also for an item of $145.79, known as the "Robe Dow Account," as to which the facts appear in the opinion. On all these items interest was charged up to the date of the finding, June 11, 1902, making a total of $4,510.83, from which the conceded indebtedness to the plaintiff was deducted, and a judgment of $880.46 in favor of the defendant entered, with costs. It appeared that Lund had been in the position of secretary prior to plaintiff's election to office; that he enjoyed a high reputation for efficiency and accuracy; that amongst the duties of the secretary were those of the keeping of the books of account. In practical operation, the entire bookkeeping was conducted under his supervision, with which plaintiff had no contact in detail; simply calling for such summary information therefrom as he needed from time to time to guide him in his general supervision of the business. Lund also had equal power with the president and treasurer to draw checks, and habitually received all incoming moneys. He earned a salary during most of the period of plaintiff's incumbency of office of $2,000 a year. The plaintiff appeals from the allowance on the counterclaim, and the defendant appeals from the disallowance of the various other counterclaims.

For the plaintiff there were briefs by *Clancey & Loverud* and *Rufus B. Smith,* and oral argument by *Mr. J. M. Clancey* and *Mr. Smith.*

For the defendant there was a brief by *Jones & Stevens,* and oral argument by *Burr W. Jones.*

DODGE, J. In approaching the crucial questions of fact in this case, an understanding of the general situation is a preliminary necessity, especially as the two litigants base their respective arguments upon radically different estimates thereof. The defendant proceeds upon the theory that plaintiff, as executive head of the business, was bound to know of and control every detail of every department thereof, and is liable for damages resulting from any act or omission which would have been negligent in one charged with the duty of such specific act. Plaintiff, on the other hand, contends that he is under no responsibility outside of certain defined departments of the business, and especially that the field of activity delegated to the secretary, either by express by-law or the custom of the corporation, was wholly outside of his responsibility; that he and the secretary were co-ordinate officers, each independent and beyond the control of the other, and each responsible only for his own acts and omissions. Cases are cited bearing upon the measure and limits of liability upon these conflicting theories. Neither is entirely right, according either to evidence or finding. Plaintiff was not a mere co-ordinate of the secretary, each having entire independence of the other. He was the head of the business, charged with its entire general management, including finances, accounts, and collections; but, on the other hand, the secretary and the bookkeeping force working under him were not a mere implement selected and entirely controlled by plaintiff. The secretary and his account books were existing institutions when plaintiff took office, created by the board of directors, and in detail, at least, not controllable by plaintiff, except by appeal to that board. They constituted, with the secretary's authority to pay out money, one of the conditions under which plaintiff must manage the business. Nevertheless, the conduct of that department being one of the elements involved in successful prosecution of the business, we have no

doubt plaintiff owed duty of such attention thereto and supervision thereof, consistent with the limitations suggested, as the general prosperity of the enterprise demanded. Plaintiff's duty, like that of all paid corporate officers, was that of absolute good faith, and such diligence, judgment, and exertion as the ordinarily capable, diligent, and prudent man would give under like circumstances. 4 Thomp. Corp. § 4671; 21 Am. & Eng. Ency. of Law (2d ed.) 874; *North Hudson B. & L. Asso. v. Childs,* 82 Wis. 460, 52 N. W. 600; *Briggs v. Spaulding,* 141 U. S. 132, 11 Sup. Ct. 924. Among those circumstances are the character of the service he was to render, the conditions under which he was compelled or expected to perform it, the means therefor which he had, or which were within his power to have, the extent to which attention to detail was consistent with proper consideration and direction of the more important general policy, and very many others.

Taking up first defendant's defensive contention that plaintiff has failed to perform his contract of service, by reason of the devotion of some portion of his time and attention to other affairs—especially the care of his mother's property and investments, but also the performance of his duties as vice-president of a bank, and the looking after the finances of the sadiron business—we cannot feel justified in disturbing the finding of the court that no substantial breach, to the injury of the defendant, occurred. Of course, an agreement "to give his full time to the company's service" is, in its nature, ambiguous. It certainly does not require twenty-four hours a day of an employee's time, nor, indeed, every moment of his waking hours. *Mobile & K. C. R. Co. v. Owen,* 121 Ala. 505, 25 South. 612. On the other hand, it undoubtedly does require that he shall make that employment his business, to the exclusion of the conduct of another business such as usually calls for the substantial part of a manager's time or attention. We cannot think, however, that the business man who undertakes to make the affairs of a corporation or of a

firm his business, and to give to it his full time, absolutely excludes himself from everything else. Usually such men have some private affairs or interests of their own, which they are not expected to entirely abandon. They may seek and make investments of their private funds, so that they do not trespass substantially upon the ordinary business hours; and, in analogy, it certainly is recognized as customary that they may give the benefit of their judgment and supervision to the care of moneys of relatives not able to protect their own interests. It is also certainly customary that men who consider themselves engrossed in active business do not hesitate to occupy places on the directory of banks, or even more important offices in such institutions. It would be unfortunate indeed for the community if a line must be drawn so strictly that only people whose services were not needed in the conduct of important business could occupy such positions. In this case it is made apparent that plaintiff devoted more than ordinary business hours to this corporation. He previously had a business as a dry goods merchant, which he gave up. He devoted his entire business days, of approximately nine hours, persistently to the defendant corporation, and in addition—what is certainly in excess of the strict contract requirement—he spent approximately one half of his evenings in devotion thereto. In the light of such facts and considerations, we do not feel justified in repudiating the conclusion of the trial court that the evidence does not sustain the allegation of failure to give his full time to the service of the defendant. There is no evidence of any pecuniary loss to the defendant from the mere fact that plaintiff looked after his mother's estate, or after the finances of the sadiron business, or that he occupied the vice-presidency of the bank; hence no counterclaim is sustained upon these facts.

As to the failure to collect from the electric light company some $600 of interest which the court finds was justly owing to the defendant, we also agree with the trial court that

plaintiff's liability is not established, and we put our agreement upon the ground that no negligence on the part of the plaintiff is shown, in failing to collect that amount. When plaintiff first found that the secretary had allowed the electric light company to become a large debtor, his conduct in putting a stop to it is characterized by most emphatic diligence. He allowed no delay—hardly reasonable time for the electric light people to examine the account before compelling that company's officers to pay the debt. He called on the bookkeeping department to furnish him a statement of the amount of that debt, and he collected the amount so shown. We are not prepared to say that it is negligence, in law, for the general manager of a business of this magnitude to rely upon trusted employees, justly supposed to be diligent and capable, for the mere ascertainment of the amount due upon an open account. It surely is not unusual for men whose attention to general affairs is of so much more importance to their corporate employer than would be their knowledge of the mere detail of figures in books to refrain from personal inspection of all the items going to make up an account, and to act upon the reports made to them by those who are charged with such details. For this reason, even if it be conceded that the amount found by the trial court was due from the electric light company, of which we have some doubt, we reach the conclusion that the finding that no damage resulted to the company from negligence of the plaintiff in that matter is sustained.

Another basis of counterclaim which was repudiated by the trial court is the failure to enforce payment from his mother's estate of more than six per cent. annual interest upon her overdrafts. That the company suffered loss thereby is predicated upon the alleged fact that at the time of any such overdrafts the company was paying a higher rate of interest to the bank; but, as pointed out by the statement of facts, the company was also at all such times in the enjoyment of con-

siderable amounts of money at exactly the rate which was charged to this estate, some parts of which, at least, were supplied by the plaintiff himself, or through his personal relationship to the lenders. It is not shown that even such personal contributions to the finances of the company were not fully equal to the amount of such overdrafts. Surely if plaintiff with one hand borrowed for the company an amount which he allowed to be borrowed from it with the other at the same rate of interest, his act could not be held to have caused pecuniary damage; hence we conclude that the court rightly refused allowance of any damages against plaintiff in this respect.

We also concur with the trial court in finding plaintiff not liable for the loss of the account against the cash register company. When he had directed it to be collected, and was, in effect, informed that it had been, we are not prepared to hold him negligent in not discrediting the secretary's statement, and proceeding to investigate the assumption of the debt by Olson.

The foregoing is all that seems to be necessary in consideration of the defendant's appeal, upon which, therefore, we find no error prejudicial to it, and should affirm the judgment, if only that appeal were before us.

2. Turning now to the plaintiff's appeal, which is from the allowance of damages against him upon the overdraft of the secretary, Lund, we must deem it sufficient to say that the finding of the trial court that plaintiff was guilty of negligence in failing to discover and thus in permitting the secretary to withdraw funds of the company in excess of his salary, through a period of some seven years—the secretary being pecuniarily irresponsible, though of excellent reputation and apparently economical habits—is supported by the evidence. We should not sustain the view that one occupying the position of general manager must at all times be cognizant with the condition of every account upon the books, even

though they were kept by immediate subordinates of his—less so where kept under the control of an officer having such measure of independence as the secretary had in this case; but one who is charged with the care of a business of this magnitude certainly owes, as a mere measure of ordinary diligence, the duty of some supervision, to see that others having access to its funds are not misappropriating them. Just what acts may constitute fulfillment or breach of that duty, it is unnecessary now to decide. We think it within the judgment of a trial court, in drawing inferences of fact, to hold that the ordinarily diligent man, in plaintiff's position, would have discovered the depletion of its funds long before the plaintiff did. It may reasonably be supposed, too, that, if that discovery had been made while the overdraft was comparatively trifling in amount, reimbursement by the secretary out of his salary might have been possible. When the discovery was made, the amount of the deficiency rendered such result improbable. Hence we cannot say that the court was wrong in concluding that the whole amount of Lund's overdraft at the time of its discovery, in 1897, might properly be held to be damage resulting from plaintiff's neglect to discover it in proper time, and take effective steps to prevent its increase and secure its repayment. As to the period of five months between the discovery of this overdraft, in September, 1897, and the final discharge of Lund, in February, 1898, during which period the overdraft increased some $300, we have more doubt. Whether it was not consistent with ordinary prudence and diligence to make the experiment whether Lund might not reform his expenditure, and gradually reduce his indebtedness to the company, and, in promotion of such hope, to refrain from blasting his reputation and destroying the confidence of the directors in him, might at least be open to different opinions. But here, again, after careful review of the situation, we have come to the conclusion that the finding must stand, and the plaintiff be held negligent in thus giving

to a known defaulter the opportunity to take to himself further moneys of the corporation, whereby resulted this additional loss. We therefore conclude that the amounts actually drawn by Lund from the treasury of the company, and entered upon its books, up to the time of his discharge, were properly held to be damages resulting from the negligence of the plaintiff, and for which he must respond, as also for the interest thereon.

At this point, however, we come in contact with a peculiar item, of $409.70, entered upon the books by Lund on the day of his discharge, the items composing which are not in evidence, but are stated to be a number of turned accounts, where Lund had receipted the accounts of debtors to the company in consideration of the discharge of his own indebtedness to such debtors. These he had never entered upon the books, and of them plaintiff never had any knowledge, nor, so far as the evidence goes, information of any fact to put him upon inquiry. We find ourselves unable to discover anything of negligence on plaintiff's part to which can be ascribed the fact that these particular accounts were lost to the company, if they were lost. Such transactions were in no way called to his attention by any entry within his reach. They transpired wholly between Lund and the outside parties. Only by accident would any one of them be likely to come to plaintiff's knowledge. To impute such knowledge to him would be to charge him with a duty of omniscience. Further, however, there is no proof of damage to the defendant. The evidence does not disclose when these transactions took place, nor that the several debtors were not, even up to the time of the commencement of the present action, wholly solvent; neither does it disclose that the indebtedness of any of them to the defendant had become barred by the statute of limitations. It hardly needs to be stated that such transactions as those of Lund with debtors of the corporation could have no possible effect in discharging their debts to it. The

very fact that they gave as consideration only a cancellation of Lund's personal liabilities to them charged them in the fullest manner with notice of his breach of duty as an agent, and they remained, as before, the debtors of the corporation. *Commercial Bank v. Ten Eyck,* 48 N. Y. 305; *Remington v. E. R. Co.* 109 Wis. 154, 163, 84 N. W. 898, 85 N. W. 321. We are convinced that there is no evidence to warrant the conclusion of law that the plaintiff is liable for this part of the recovery awarded against him.

Another item included in the so-called Lund overdraft is a charge of $145.79 on turning account with one Dow, made not until January 10, 1899. At that time Dow appeared as a debtor on account to the defendant, and an unexplained entry was then made, charging the above amount to Lund. There is not the slightest evidence to show that Dow parted with any consideration or changed his position in any way by reason of such book entry, or that it was made in pursuance of any agreement with him to which plaintiff was a party. No reasonable explanation is made by defendant of any theory on which it can be claimed that defendant lost anything thereby, and we find ourselves unable to discover any evidence to warrant the conclusion that Dow was any less liable to defendant after than before such entry, nor, if he is, how the plaintiff's acts have aided to that result. This item was erroneously included in the damages allowed.

Another error, obviously clerical, has attracted our notice, which, although not mentioned by counsel, is covered by the general language of both an exception and an assignment of error, so that we must correct it. It consists in adopting as the increase of Lund's overdraft between September 1, 1897, and February 8, 1898, the sum of $921.25, while the true increase was only $710.77, even including the turned accounts. This resulted from deducting an interest charge of $210.48 from the ledger balance of September 1, 1897, to get the true amount of overdraft to that time, and in omitting

to make the same deduction from the ledger balance of February 8, 1898, when that of September 1st was compared with it to ascertain the increase.

From the foregoing, it results that the judgment is erroneous, to the prejudice of plaintiff, in the sum of the above-mentioned improper allowances, plus the interest thereon as included in the judgment. Deduction must therefore be made from the allowance on counterclaim as follows, as of the date of the findings, June 11, 1902:

| | |
|---|---|
| Turned-accounts item | $409 70 |
| Clerical error | 210 48 |
| Interest on both, February 8, 1898, to June 11, 1902 | 161 55 |
| Robe Dow account, with interest as in findings | 175 75 |
| Total deductions | $957 48 |

This deducted from the $4,510.83 awarded defendant on its counterclaim leaves as the true allowance, $3,553.35, which, being set off against the $3,630.77 allowed on plaintiff's cause of action, results in a balance of $77.02, for which, with interest from June 11, 1902, plaintiff should have judgment against defendant.

*By the Court.*—On plaintiff's appeal the judgment is reversed, and cause remanded with directions to enter judgment in plaintiff's favor for seventy-seven and $\frac{02}{100}$ dollars ($77.02), with interest from June 11, 1902, and for his costs. Defendant will take nothing on its appeal.

SIEBECKER, J., took no part.

CARPENTER, Respondent, vs. FULMER and another, Appellants.

*June 4—June 18, 1903.*

*Setoff: Contracts: Bonds: Conditions: Construction: Breach: Principal and surety: Liability of surety.*

1. Except in cases for equitable consideration, the right of statutory setoff must exist between all the parties plaintiff and all the parties defendant, and from and to those persons only who are parties to the action.
2. Where one of the co-obligees in a bond assigned his rights therein to the other obligee, and such assignee brought action on the bond, the indebtedness evidenced by a note given to the obligor in the bond by the assigning obligee and another cannot be set off against the liability arising on the bond.
3. A contract provided, among other things, that the buyer should have possession of certain "cedar posts and poles," should sell the same, and deposit the proceeds to the amount of $3,000 in a designated bank in two instalments, on specified dates. A bond was given, conditioned that should the property, "when sold, not bring the amount of $3,000," the obligor and surety "will pay the deficiency if any, *in the manner* above set forth;" and that "this bond is given to secure the performance of a certain contract entered," etc., between the parties. The bond was further conditioned that the parties thereto should well and truly carry out all of the above agreement without fraud or delay. In an action on such bond there was no evidence that any sum was so deposited to the credit of the obligee at the said bank. *Held*, that the failure to do so was a breach of the contract and bond, and gave the obligee the right to demand payment from the principal and surety on the bond.

APPEAL from a judgment of the circuit court for Florence county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an action to recover on a contract. Plaintiff and J. F. Keeton made a contract October 20, 1899, with defendant *Fulmer,* whereby defendant *Fulmer* purchased from plaintiff and Keeton the right, title, and interest in the stock, real and personal property, and all claims, moneys, and assets as well as all actions and rights of action which had ac-

crued or were to accrue of the D. M. Fulmer Lumber Company, a corporation, and all of their right, title, and interest in and to the demands, claims, or causes of action in their favor and against the D. M. Fuller Lumber Company, a copartnership, and to discontinue all actions then pending brought by them against said corporation, copartnership, or *D. M. Fulmer* personally. *D. M. Fulmer* agreed to pay as consideration therefor and in settlement of all actions pending the sum of $5,000 in the following manner: $2,000 at the date of agreement, $1,500 July 1, 1900, $1,500 October 1, 1900, and as further consideration agreed to save plaintiff and Keeton harmless from any and all claims, demands, and causes of action which they might be held liable for as members of the copartnership, or as stockholders and officers of the corporation. *D. M. Fulmer* further agreed to execute a bill of sale of all cedar poles and posts in the D. M. Fulmer Lumber Company's yard at Florence, Wisconsin, which were to be left in *Fulmer's* possession, with the right to sell and "deposit the proceeds derived from the sale of said poles and posts to the amount of $3,000 in the State Bank of Florence, in the following manner: $1,500 on or before the 1st day of July, 1900, and $1,500 on or before the 1st day of October, 1900; said sums to be deposited to the credit of the parties of the second part [plaintiff and Keeton]; and it is expressly agreed that *D. M. Fulmer* is to retain all the money over and above $3,000 for which he may sell said cedar poles and posts." *Fulmer* further agreed to give a bond, with sureties, to be approved by plaintiff and Keeton, that he would deposit the proceeds derived from the sale of poles and posts to the amount of $3,000 as specified. It further appears that on the date of the contract *D. M. Fulmer,* as principal, and *Peter McGovern,* as surety, gave a bond to plaintiff and Keeton in the penal sum of $3,000, which in terms states:

"But should the property aforesaid [poles and posts] when sold not bring the amount of $3,000, then the said *D. M.*

*Fulmer* and *Peter McGovern* will pay the deficiency, if any, in the manner above set forth. This bond is given to secure the performance of a certain contract entered between *D. M. Fulmer* and John F. Keeton and *J. S. Carpenter* of even date with this bond."

No evidence was offered upon the trial as to whether the poles and posts had been sold or not. The contract provisions pertaining to the deposit of the money in the bank, to be applied on the notes, have not been complied with. Keeton assigned to plaintiff all his right, title, and interest in the contract and bond and the poles and posts on October 20, 1899. This action is a consolidation of two actions brought against defendants, the principal contractor, and *Peter McGovern,* as surety in the bond, to recover the amount of the $3,000 due on the contract. Defendant *Fulmer* alleges by way of setoff to plaintiff's claim a note executed by John F. and H. C. Keeton October 3, 1893, for $850, with interest, payable to himself. The court, upon motion, struck out defendant's allegation covering the setoff as not a proper claim for setoff in this action, and awarded plaintiff judgment for the $3,000, with interest and costs. Defendants appeared and answered separately after the actions were consolidated. From the judgment entered, the defendants appealed.

For the appellants there was a brief by *Max Sells* and *A. W. Shelton,* and oral argument by *Mr. Shelton.*

*W. B. Quinlan,* for the respondent.

SIEBECKER, J. Error is assigned upon the action of the court striking out that part of *Fulmer's* answer alleging a setoff in his favor on the note owned by him for $850 and interest, given by John F. and H. C. Keeton. The plaintiff is no party to this note in any form. It furthermore appears that H. C. Keeton is a party to this note as maker, but is not a party to this action. How this note could be treated as a proper setoff in an action between the parties to this contract

we cannot perceive. *Carpenter,* the party plaintiff in this action, was in no wise liable on the note, nor is H. C. Keeton, the joint maker of the note, in any way connected with or liable on the contract. The nature of a setoff is predicated upon the grounds that it constitutes, in effect, a cross-action by defendant against plaintiff, and requires that there be mutuality of claims. In cases of statutory setoff the right thereto must exist between all the parties plaintiff and all the parties defendant, and from and to those persons only who are parties to the action, except in cases for equitable consideration. See *Pendleton v. Beyer,* 94 Wis. 31, 68 N. W. 415. The matters alleged did not constitute a setoff between the parties. *Dart v. Sherwood,* 7 Wis. 523; *McConihe v. Hollister,* 19 Wis. 269; 22 Am. & Eng. Ency. of Law, 280.

It is further contended that the court erred in awarding judgment on the agreement and bond against *Peter McGovern,* on the ground that no liability was shown against *McGovern* as surety on the bond. In support of this contention appellants assert that the provisions of the contract and bond should be interpreted together as the agreement of the parties covering this transaction, and that the terms of the bond must be strictly construed in the surety's favor to ascertain his liability. Applying these rules to the contract and bond before us, what is the effect of the agreement evidenced by the contract and bond? It is stipulated in the contract that the $3,000 to be paid by *Fulmer* in the manner specified was to be secured by a bill of sale of the cedar poles and posts then in the lumber yard at Florence; that they were to remain in *Fulmer's* possession, to be sold by him, and the proceeds to be deposited to the credit of plaintiff and Keeton to the amount of $3,000 in the State Bank of Florence for the payment of the amount unpaid on said contract, in the following manner: $1,500 on or before July 1, 1900, and $1,500 on or before October 1, 1900, and he to retain all sums realized above said amounts. These poles and posts were left in *Ful-*

*mer's* possession to the purpose that he sell them and deposit the proceeds from the sale thereof in the manner and to the respective amounts specified on or before the 1st of July and the 1st of October, 1900, to plaintiff and Keeton's credit. The condition of the bond, among other things, states: "Should the property [poles and posts] when sold not bring the amount of $3,000, the said *D. M. Fulmer* and *Peter McGovern* will pay the deficiency, if any, *in the manner* above set forth;" and that "this bond is given to secure the performance of a certain contract entered," etc., between the parties; and, further, that the parties to this agreement should well and truly carry out all of the above agreement without fraud *or delay*. Interpreting the terms of the contract and bond as applied to this transaction, the result is that *Fulmer* was to make sale of the poles and posts, deposit what proceeds he received to plaintiff's and Keeton's credit in the bank to the amount specified in the contract as a payment of the unpaid consideration, and, if a sufficient amount was not so deposited, then *Fulmer,* and *McGovern,* as his surety, were required to pay whatever amount was necessary to pay the $1,500 instalments when due without delay. It must, therefore, follow that *McGovern* was bound, as surety on the bond, to pay whatever remained unpaid on each instalment of $1,500 at the time it became due. Nothing appears that any sum was so deposited to the plaintiff's and Keeton's credit at the bank. The failure to do this is a breach of the contract and bond, and gives plaintiff the right to demand payment from the principal and his surety. The judgment of the trial court was properly awarded.

*By the Court.*—Judgment affirmed.

ZAHL, Appellant, vs. BILLINGS, Respondent.

*June 4—June 18, 1903.*

***Replevin: Direction of verdict: Conveyance in fraud of creditors: Evidence.***

1. **In an action of replevin where the evidence showed that plaintiff had good title to the property as against all the world, except as against the creditors of plaintiff's vendor, in the absence of evidence that such vendor had any creditors, or that defendant had seized the property in question as an officer on any process against such vendor, a motion to direct a verdict in plaintiff's favor should have been granted.**
2. **In such case, if the defendant could show that the property was in fact the property of such vendor, and was transferred to plaintiff with intent to hinder, delay or defraud the vendor's creditors, he might impeach the sale; but, in order to be in a situation to challenge the *bona fides* of the transfer, the defendant must show the fact that he is a creditor, and had seized the property upon attachment or execution to satisfy his claim.**
3. **A transfer of property in fraud of creditors is good as between the parties, and as to all persons except the creditors defrauded.**

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action of replevin to recover twenty and one-half barrels of Minnesota patent flour. The answer was a general denial. The action was tried before a jury. The plaintiff's evidence showed that prior to September, 1898, a flour and feed store was operated in Antigo by one W. J. Zahl in the name of his father, C. F. Zahl; that in September, 1898, the stock in the store was sold by C. F. Zahl to the plaintiff, his daughter, for $400, the bill of sale being executed by W. J. Zahl, as attorney in fact for his father; that thereafter W. J. Zahl operated the business in the name of the plaintiff; and that in February, 1899, the defendant took the flour in question from the stock in the store. These facts were not disputed by the defendant, but he introduced evidence,

consisting mostly of statements said to have been made by W. J. Zahl, tending to show that he (W. J. Zahl) was in fact the owner of the stock, and operated the business in the name of his father and sister in order to keep it from the reach of his creditors. There was no evidence that W. J. Zahl had any creditors, or that the defendant had seized the property in question as an officer on any process against W. J. Zahl or any other person. A motion to direct a verdict for the plaintiff was denied, as also were motions for nonsuit and to direct a verdict for the defendant. The jury returned the following special verdict:

"1. At the time this action was commenced, was the plaintiff the owner of and entitled to the possession of the flour in question? *Answer.* No. 2. What was the value of the flour at that time? *A.* Four dollars. 3. What is the value of said flour at the present time? *A.* (by the court). Two dollars and twenty-five cents per barrel."

A motion for a new trial was overruled, and judgment rendered for the defendant, from which plaintiff appeals.

The cause was submitted for the appellant on the brief of *W. F. White,* attorney, and *Max Hoffman,* of counsel, and for the respondent on that of *Finucane & Conway.*

WINSLOW, J. It is manifest that the plaintiff's motion to direct a verdict in her favor should have been granted. The evidence showed that she had a good title against all the world except as against the creditors of W. J. Zahl. If they could show that the stock of goods was in fact the property of W. J. Zahl, and was transferred to the plaintiff with intent to hinder, delay, or defraud them, they might impeach the sale; but in order to do this they must not only show the fraudulent intent, but must also show the fact that they were creditors, and that the defendant had seized the property upon attachment or execution to satisfy their claims. No such facts were pleaded or shown, therefore the defendant

was in no situation to challenge the *bona fides* of the transfer of the stock to the plaintiff. A transfer of property in fraud of creditors is good as between the parties, and as to all persons except the creditors defrauded.

*By the Court.*—Judgment reversed, and action remanded for a new trial.

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FIELD and others, Appellants, vs. HECKMAN, Respondent.

*June 4—June 18, 1903.*

*Default judgments: Vacating: Discretion: Costs: Immaterial error: Justices' courts: Second adjournment: Loss of jurisdiction.*

1. While a trial court has broad powers as to judgments by default, enabling it to relieve a party therefrom for fraud of one obtaining the judgment, or surprise, mistake or excusable neglect, upon application therefor being seasonably made, it cannot properly act arbitrarily in such a matter. Its action should always be based upon some legitimate ground, the end in view being to promote justice along the lines of those remedies for wrongs which the law affords to litigants.
2. If the affidavits upon which an order setting aside a default judgment is granted do not indicate some injustice to the moving party, actual or probable, and some reasonable excuse for his failure to be present at the trial of the cause, and for not moving to set aside the judgment promptly on receiving notice thereof, such order must be held erroneous.
3. The taxation of costs is a mere incidental effect of a judgment. Failure to obtain a hearing at the taxation thereof, or the excessive amount in fact taxed, furnish no ground for setting aside and vacating a judgment.
4. On a motion to set aside and vacate a judgment, it appeared, among other things, that the cause had been on the calendar three terms and was finally called for hearing and judgment of default entered in plaintiff's favor for costs; that the action came to the circuit court on plaintiff's appeal from a judgment of a justice's court dismissing the action because the justice had lost jurisdiction, and that the appeal had been taken without any affidavit making a new trial in the circuit court possible. It was stated in the moving affidavit that defendant had

a good defense to plaintiff's cause of action. The circuit court granted the motion on the grounds that the failure of defendant to be present was sufficiently excused, and that the costs taxed were excessive. No complaint was made that the judgment itself was wrong. *Held*, that whether plaintiff had a good cause of action was not directly involved in the motion, the only question presented by the appeal being whether the justice properly decided that his jurisdiction had terminated.

5. On appeal from a justice's judgment plaintiff secured a default judgment of reversal. Defendant moved to set aside and vacate the judgment on grounds excusing his failure to be present on the trial. The moving affidavit, verified by defendant's attorney, alleged that it was understood between the attorneys for the respective parties that the case would be taken up for trial only on notice; that the cause had been allowed to lose its place on the calendar, and was taken up by plaintiff's attorney and judgment obtained, defendant's attorney having no information thereof; that two days thereafter notice of taxation of costs, with proposed cost bill, was served on defendant's attorney; that defendant's attorney attended at the time and place noticed for taxation of costs, but plaintiff' attorney being absent he went away, after telling the clerk to notify him, and he heard nothing more about the matter until nine days later his client informed him that execution had issued. Prior to judgment of reversal plaintiff had endeavored to avoid the effect of the appeal by satisfying the judgment of the lower court, and had brought his action in that regard to the attention of the circuit court. *Held*, that no excuse was stated justifying an order setting aside and vacating the judgment of reversal.

6. In such case, it conclusively appeared that the reversal of the justice's judgment was not the ground of the plaintiff's complaint, but, on the contrary, failure to be heard on the taxation of costs, and that the only legitimate objection to the costs, as taxed, was the inclusion therein of a sum about equal to reasonable terms for setting aside the taxation. *Held*, that if the trial court had allowed the judgment for costs to stand as taxed no injustice would have been inflicted.

7. Sec. 3631, Stats. 1898, provides that in justices' courts no second adjournment shall be allowed, unless the moving party shall satisfy the justice by oath that he cannot proceed to trial for want of some material witness, that he has used due diligence to obtain the same, etc. Subd. 11, sec. 3626, provides that if an amendment be made after the joining of issue, or answer be made after adjournment, and it be made to appear to the

**satisfaction of the court by oath that an adjournment is necessary to the adverse party in consequence thereof, an adjournment shall be granted. In an action in justice's court, it appeared that the defendant demurred to the complaint, that the cause was adjourned one week, and that on the adjourned day the demurrer was overruled and defendant answered, whereupon the justice granted plaintiff's motion for an adjournment as terms of allowing the answer to be filed, plaintiff showing grounds for such adjournment. *Held*, that it was error for the justice to dismiss the action on the ground that by such second adjournment he had lost jurisdiction.**

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

The action was commenced in justice's court. On the return day plaintiffs filed a complaint, defendant demurred thereto, and the cause was then adjourned for one week. Upon the adjourned day the demurrer was overruled and defendant answered, the court granting plaintiffs' motion for an adjournment as terms of allowing the answer to be filed, plaintiffs showing grounds for such adjournment. The defendant objected to the adjournment. Upon the second day defendant appeared specially and moved to dismiss the cause upon the ground that the court by the second adjournment lost jurisdiction. The motion was granted, judgment being rendered in defendant's favor for $14 costs. Plaintiffs appealed to the circuit court, not making, however, any affidavit for a trial *de novo*. The cause was on the calendar in such court for three terms. It was finally called for hearing, plaintiffs appeared, and judgment was entered reversing the judgment of the justice, with costs in favor of plaintiffs. Thereafter, upon due notice and affidavits, the judgment was set aside and the cause ordered to stand for trial. The grounds for such action were that the failure of the defendant to be present upon the former trial was sufficiently excused and the costs taxed were excessive from the fact that $14 was included therein as and for the judgment for costs rendered against the plaintiffs in justice's court, which judgment had not been paid

by plaintiffs, except so far as necessary to perfect the appeal and, as regards the defendant's interest therein, had been released. No complaint was made in the moving affidavits for relief upon the ground that the judgment was improper in form or excessive. The sole ground was that defendant, through surprise, improper conduct of plaintiffs' attorney, or excusable neglect, had lost the right to a hearing of the appeal upon the merits. The affidavit in his behalf was made by his attorney. It was to this effect: It was understood between the attorneys for the respective parties that the case would be taken up for trial only upon notice. There was only an issue of law to be heard,—one going to the jurisdiction of the justice of the peace. The cause was allowed to lose its place on the calendar or become so circumstanced that an arbitrary taking up of the same by the attorney for one party, in the absence of the attorney for the other, was in bad faith. It was taken up by plaintiffs' attorney October 28, 1902, defendant's attorney having no information thereof, and the judgment complained of obtained. Two days thereafter notice of the taxation of costs, with a proposed cost bill, was served on defendant's attorney, informing him that the costs would be taxed by the clerk of the circuit court on November 10 thereafter at 11:30 a. m. At such time defendant's attorney appeared at such office to attend upon such taxtion. Plaintiffs' attorney not being present defendant's attorney went away, telling the clerk to notify him before taxing the costs. He heard nothing further about the matter till informed by his client by telephone that an officer was pressing him to pay the judgment, an execution having been issued thereon. Immediate steps were taken to open the judgment. Defendant has a good and substantial defense to plaintiffs' cause of action. The opposing affidavits were to this effect: Plaintiffs' attorney, before taking the cause up for a hearing, called on defendant's attorney to notify him thereof. Finding him absent, word was left with his law

partner, who promised to inform him. Plaintiffs' attorney appeared in court at the time to which the aforesaid notice related, for the purpose of taking up the cause. He waited one day and part of another for defendant's attorney to appear and then moved the cause, by permission of the court, with the result complained of. The cost bill was presented to the clerk of the circuit court for taxation at the time set therefor in the notice served upon defendant's attorney. It was then duly taxed and the amount thereof in due form inserted in the judgment. The term of court, at which the judgment was rendered, remained in session for eleven days thereafter, and nine days after notice of the taxation of costs was served upon defendant's attorney.

On the hearing of the motion defendant's attorney offered to pay plaintiffs' attorney the amount due upon the latter's claim, exclusive of all costs, being $25.28. He had theretofore satisfied the judgment against the plaintiffs in justice's court, but had not refunded any part of the costs which the plaintiffs' attorney paid to perfect his appeal. By the order setting aside the judgment, leave was granted to plaintiffs to accept such offer within five days and dismiss the appeal without further costs, and to thereby prevent a rehearing. Plaintiffs appealed from the order.

For the appellants there was a brief by *Weed & Van Doren,* and oral argument by *R. N. Van Doren.*

For the respondent the cause was submitted on the brief of *J. E. Lehr,* attorney, and *Pierce & Lehr,* of counsel.

MARSHALL, J. While a trial court has broad powers as to judgments by default, enabling it to relieve a party therefrom for fraud of the one obtaining the judgment, or surprise, mistake or excusable neglect of such party, upon application therefor being seasonably made, it cannot properly act arbitrarily in such a matter. Its action should always be based upon some legitimate ground, the end in view being

to promote justice along the lines of those remedies for wrongs which the law affords to litigants. In view of that, if the affidavit upon which the order was granted did not indicate some injustice to the moving party, actual or probable, and some reasonable excuse for his failure to be present at the trial of the cause, and for not moving to set the judgment of reversal aside promptly upon his counsel's receiving notice thereof, such order must be held erroneous. *Stilson v. Rankin,* 40 Wis. 527.

We have looked in vain in the record to find that respondent made complaint upon the hearing of the motion, or in his affidavit in support of the same, that the judgment of reversal was itself wrong. The chief ground urged in support of the motion was failure, by reason of the fault of appellants' counsel, to obtain a hearing upon the taxation of costs, and of the excessive amount in fact taxed. That, of course, furnished no ground whatever for vacating the judgment of reversal. The taxation of costs was a mere incidental effect thereof. It was stated in the moving affidavit that respondent had a good defense to appellants' cause of action, but such cause of action was not directly involved. It had not been tried, nor was it triable upon the appeal. The action having been dismissed below without a trial, and the appeal having been taken without any affidavit making a trial possible in the circuit court, the only question presented in the reviewing court was whether the justice properly decided that his jurisdiction terminated by reason of the adjournment.

It very conclusively appears from several circumstances that the mere fact that the justice's judgment was reversed was not the cause of complaint upon which the order complained of was based. Significant of such circumstances is the fact that prior to the reversal respondent endeavored to avoid the effect of the appeal by satisfying the judgment in the justice's court and bringing his action to that end to the attention of the circuit court. Another of such circumstances

is the fact that for nearly two weeks after the reversal was known to respondent's attorney respondent slept upon his rights and made no complaint till after the unsuccessful attempt of his attorney to obtain a hearing before the clerk on the taxation of costs. The attorney testified in support of the motion that he did not know of the judgment till the execution was issued. The only reasonable way, it seems, to reconcile that with other statements in his affidavit is to consider that he did not mean that he had no knowledge of the reversal till informed of the execution, but that he had no knowledge of the taxation of costs and of the perfected judgment till then. His admission that the cost bill was served upon him two days after the reversal and eleven days before he was informed of the execution, in effect admits that he was informed of the reversal at an early date, and that the final act of perfecting the judgment was only delayed by the necessity to first tax the costs. Upon the whole situation we are unable to perceive any excuse stated in the moving affidavits for setting aside the judgment of reversal.

There was some reasonable showing made, upon the motion, for relief from the taxation of costs upon terms. Appellants' attorney was not at fault because respondent's attorney failed to be present when the costs were taxed. He gave due notice of the time when such cost bill would be presented to the clerk for consideration. He appeared before the clerk, pursuant to such notice, and the costs were regularly taxed. The failure of defendant's attorney to be present was wholly his own fault. True, he testified that he called at the clerk's office and requested the clerk to notify him of the proceedings to tax the costs before completing the same, and that he relied upon receiving such notice, but it does not appear that the clerk agreed to give such notice, nor, if he did, that appellants' attorney was concerned in the matter in any way whatever. The only legitimate objection to the costs as taxed is the inclusion therein of that part of the

judgment rendered by the justice, not paid by the appellants in order to perfect the appeal. The excess did not amount to more than reasonable terms for setting aside the taxation. It probably did not exceed $10. The right of respondent upon the one hand was therefore equitably offset by appellants' right upon the other. In other words, if the trial court had allowed the judgment for costs to stand as the same were taxed, no injustice would have been inflicted upon respondent.

If we were to waive all other questions, that of whether respondent was prejudiced by reason of his attorney's failure to be present in court upon the hearing of the cause would have to be ruled against him. The justice's judgment was clearly erroneous. That was apparent upon the most casual inspection of his return. It was rendered, evidently, upon the theory that jurisdiction was lost by adjourning the cause a second time without compliance with sec. 3631, Stats. 1898, requiring an affidavit setting forth the particular matters specified therein. Such section, however, does not apply strictly to a case where a second adjournment is rendered necessary by the formation of an issue after the first adjournment, as was done in this case. That is governed by subd. 11, sec. 3626, Stats. 1898, which provides that if an amendment be made after the joining of issue, or answer be made after adjournment, and it be made to appear to the satisfaction of the court by oath that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment will be granted. It will be observed that such provision does not require any particular matter to be stated as a prerequisite to adjournment. It simply requires that the necessity for the adjournment shall be made to appear by oath to the satisfaction of the justice. That being done, the justice not only has authority to grant the necessary adjournment, but it is his judicial duty to do so. The docket entries in this case show that upon the amended answer being filed,

satisfactory cause upon oath was shown for an adjournment. The justice so adjudicated. He then had no other course to pursue than the one which he did pursue.

The conclusion from the foregoing is that there was no merit in respondent's application to set the judgment of reversal aside in any view of the matter. The most that could reasonably have been claimed was a new taxation of costs. Since, as before indicated, the excessive amount of costs taxed was no more than what might have been properly imposed as a condition of granting relief from the taxation, there was no good reason for granting defendant any substantial relief at all. The order setting aside the judgment *in toto* without terms, and compelling appellants, who were guilty of no injustice to respondent, to surrender entirely their legal right to a reversal of the justice's judgment, and to costs upon the appeal, and to accept the amount due them according to their complaint filed in justice's court, or submit to a rehearing upon the appeal, seems to have been wholly unjustifiable. The order must be reversed.

*By the Court.*—The order appealed from is reversed, and the cause remanded with directions to enter an order reinstating the judgment of reversal.

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## THE STATE VS. WEST.

*June 5—June 18, 1903.*

***Criminal law and practice: Adultery: Evidence: Husband and wife: Competency as witnesses.***

1. **The rule that neither husband nor wife can testify for or against the other is confined to cases where the testimony, if given, would be by one directly for or against the other, such other being a party to the litigation.**

**2. In a prosecution for adultery where separate informations are filed, the husband of defendant's partner in crime is competent to testify as to his marriage, and generally as regards the alleged offense.**

REPORTED from the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Question answered in the affirmative.*

The accused, *Ellsworth West,* was prosecuted for the crime of adultery. He was complained of jointly with his alleged partner in crime, Irene Foreman. Upon a preliminary examination both were held for trial. Separate informations were filed, each being charged with having committed with the other the crime of adultery. On the trial of *West,* the husband of Irene, at the request of the state and against objection by the accused, was permitted to testify in respect to the fact of marriage between himself and Irene, and generally as regards the alleged offense. There was a verdict of guilty. Thereafter, in due form of law, the circuit judge certified to this court for decision this question: Did the court err in overruling the objection of defendant's counsel to the competency of Allen Foreman as a witness, or in other words, in a prosecution for adultery where the man is prosecuted separately, is the husband of the woman with whom the adultery is alleged to have been committed a competent witness to prove the marriage and to testify to incriminating circumstances?

For the plaintiff there was a brief by the *Attorney General* and *L. H. Bancroft,* first assistant attorney general, and oral argument by *Mr. Bancroft.*

For the defendant the cause was submitted on the brief of *R. F. Kountz.*

MARSHALL, J. The rule is familiar that husband and wife cannot be witnesses for or against each other. Does that rule apply to the question in respect to which a decision is de-

sired? Restating the court's question in a proper form, to the end that it may be answered affirmatively or negatively, it is this: Is the rule that neither husband nor wife can testify for or against the other confined to where the testimony, if given, would be by one directly for or against the other, such other being a party to the litigation? It must be conceded that there is authority both ways in respect thereto, but it seems, as claimed by the attorney general, that this court, in *State v. Dudley,* 7 Wis. 664, adopted the affirmative for this state. True, there is a difference between the manner in which the question was submitted there and here. Here is the former question: "Was the witness, John W. Winders, the divorced husband, competent to prove his marriage with his divorced wife, Mary Adaline Winders?" While that question was limited by two circumstances, first, the witness and his wife were divorced between the time of trial and the alleged commission of the offense, and second, he was a witness merely of the fact of marriage, nevertheless the affirmative of the question was maintained as not falling within the general common-law rule, and the court considered and decided it from that standpoint, apparently not deeming material the circumstances distinguishing it from the one we have here. That is evident not only from the reasoning of the opinion, but from the authorities cited. In none of such authorities was the circumstance of a divorce present. In the cases cited as conflicting with the decision of the court are such as *State v. Welch,* 26 Me. 30, where the proposition was whether, on the prosecution of a man for adultery, the husband of the woman was competent to testify against him as to the fact of adultery, the decision being in the negative.

Whether the view which this court thus early took of the law is the better one we need not here discuss, nor whether it is supported by the greater weight of authority. Statements can be found in text-books both ways. Certain it is that

many courts are in full harmony with this court on the subject. *Campbell v. State,* 133 Ala. 158, 32 South. 635, cited by the attorney general, is an instance of that. There it is said, in effect, that the law is well settled that a husband may testify on the trial of a party separately charged with being guilty of an offense committed jointly by him with the witness' wife, subject to the rule as to confidential communications between husband and wife. Such communications are obviously covered by a rule which applies regardless of whether the evidence relates to a person on trial or not, both at common law and under the statute. Sec. 4072, Stats. 1898. In Wharton's Crim. Ev. § 396, it is said:

"The mere fact that the testimony to be given by a wife criminates her husband, or that the testimony of the husband criminates the wife, does not exclude such testimony in prosecutions in which the party so criminated is not a defendant. Yet while such testimony will be admitted, it will not be compelled."

Similar expressions can be found in the works of most text-writers. In 1 Ency. Ev. 633, it is said:

"Where the paramour is on trial the authorities are in conflict as to the admissibility of testimony of the husband or wife, the weight of authority holding it incompetent."

An examination of the authorities cited, however, leaves one in doubt as to the correctness of the author's view. It would require much time for a full review of the subject. We will not attempt it, since it appears, as before indicated, that the court's question, as we have restated it, must be answered in the affirmative in harmony with the previous decision rendered here.

*By the Court.*—The question submitted, as construed and restated, is answered in the affirmative.

## THE STATE VS. KNIGHT.

*June 5—June 18, 1903.*

*Criminal law and practice: Municipal courts: Certifying questions to supreme court: Jurisdiction: Witnesses: Impeachment: Reputation: Remoteness.*

1. Under sec. 2, ch. 49, Laws of 1901 (providing, as to the municipal court of Dane county, that the general provisions of law which may at any time be in force relative to circuit courts, and actions and proceedings therein, shall relate also to said municipal court, unless inapplicable), it is within the authority of the municipal court of Dane county to certify questions of law to the supreme court, under sec. 4721, Stats. 1898 (providing that if upon the trial of any person who shall be convicted in a circuit court any question of law shall arise which, in the opinion of the judge, shall be so important or so doubtful as to require the decision of the supreme court, he shall, if the defendant desire it or consent thereto, report the case so far as may be necessary to present the question of law arising thereon), and that the supreme court has jurisdiction under such statutes to act upon such report.
2. Evidence as to the reputation of a witness for truth and veracity in the vicinity of his prior residence, twenty-two months before the trial, is not inadmissible merely on the ground that it is too remote.
3. Such evidence is not inadmissible merely because another and subsequent domicile has been shown, and that the witness had established a reputation therein.
4. The question whether or not specific error in striking out evidence was prejudicial to the accused is not a proper one for certification or answer under sec. 4721, Stats. 1898.

REPORTED from the municipal court of Dane county: ANTHONY DONOVAN, Judge. *First question answered in the affirmative; second question left unanswered.*

Defendant was tried in January, 1903, in the municipal court of Dane county, on charge of adultery. The prosecuting witness having testified to the act, and the defendant having denied it, the state, in rebuttal, introduced impeaching evidence of the bad reputation of defendant for truth

and veracity at the village of Oregon, where he resided from about March, 1901, to about June, 1902. Defendant then offered, and the court received, evidence of a witness that he was familiar with defendant's reputation for truth and veracity at the city of Stoughton, where he had resided all his life, up to March, 1901, and that it was good. Thereupon the state moved to strike out that testimony, and the court granted the motion, for the reason that the proper foundation was not laid, and because said witness had stated that he did not know the reputation of the defendant at Oregon, where he had established his last reputation; that the evidence must be confined to reputation of the defendant in the vicinity where he had a last fixed domicile, and had acquired a reputation. Other witnesses, prepared to testify to the same effect, were therefore not sworn. After a verdict of guilty, the municipal judge certified to this court the questions: "(1) Did the court err in striking from the record the testimony of the witness from Stoughton? (2) If so, is such error prejudicial to the defendant, *Thomas S. Knight?*"

For the plaintiff there was a brief by the *Attorney General* and *W. D. Corrigan,* second assistant attorney general, and *F. L. Gilbert,* district attorney, and oral argument by *Mr. Corrigan.*

For the defendant there was a brief by *John A. Aylward* and *J. M. Clancey,* and oral argument by *Mr. Aylward.*

DODGE, J. The first subject debated is whether this court is authorized by the statutes to answer questions of law in criminal cases upon a report from the judge of the municipal court of Dane county, as it is upon the report of a circuit judge by express provision of sec. 4721, Stats. 1898. That section provides:

"If upon the trial of any person who shall be convicted in said circuit court any question of law shall arise which, in the opinion of the judge, shall be so important or so doubtful

as to require the decision of the supreme court, he shall, if the defendant desire it or consent thereto, report the case so far as may be necessary to present the question of law arising therein."

This statute, if applicable to the municipal court of Dane county, or to cases pending therein, is rendered so by sec. 2, ch. 49, Laws of 1901, which provides:

"The general provisions of law which may at any time be in force relative to circuit courts, and actions and proceedings therein, shall relate also to said municipal court, unless inapplicable."

Under an entirely analogous statute relating to the municipal court of Milwaukee, it was decided in *State v. Allison,* 47 Wis. 548, 2 N. W. 1141, that the municipal judge was not authorized to report cases falling within the jurisdiction which he held concurrently with justices of the peace; and as late as *Wendel v. State,* 62 Wis. 302, 22 N. W. 435, it was again declared that the question whether such reports might be made and received, in cases within the jurisdiction held concurrently with circuit courts, was open and undecided. As early as *State v. Witham,* 70 Wis. 473, 35 N. W. 934, however, this court, without question or discussion, received and acted upon such a report from the municipal court of Rock county, and thence onward many cases are found of similar action upon reports from various inferior courts having no authority except statutes similar in character to that governing the municipal court of Dane county. Some of those cases are the following: *State v. Witham,* 70 Wis. 473, 35 N. W. 934; *State v. Whitton,* 72 Wis. 18, 38 N. W. 331; *State v. Cornhauser,* 74 Wis. 42, 41 N. W. 959; *State v. Whitmore,* 75 Wis. 332, 43 N. W. 1133; *State v. S. A. L.* 77 Wis. 467, 46 N. W. 498; *State v. Goodrich,* 84 Wis. 359, 54 N. W. 577; *State v. Eaton,* 85 Wis. 587, 55 N. W. 890; *State v. Wendler,* 94 Wis. 369, 68 N. W. 759; *State v. Sawell,* 107 Wis. 300, 83 N. W. 296. It was not until substan-

tially all of these cases had been decided that ch. 49, Laws of 1901, was enacted. We cannot doubt, therefore, that this persistent and long-continued practical construction by the profession and by the courts of statutes practically identical in phraseology must be considered as adopted by the legislature in re-enacting in the same words with reference to this particular municipal court, whatever might have been our view upon deliberate discussion and consideration of such statute originally. We conclude that it was within the authority of the municipal court to report this case in compliance with sec. 4721, Stats. 1898, and that we have jurisdiction under that statute to act upon such report.

We therefore proceed to consider the first question certified—whether "the court erred in striking from the record the testimony of the witness from Stoughton," which related to defendant's reputation at that place for truth and veracity. Doubtless the decision of a trial court as to admissibility of this and many other classes of evidence, which depends on the prior establishment of other facts, may involve much of judicial discretion, to which all due regard should be given by a reviewing court when it appears to have been exercised. That consideration can have but little force in the present instance, however, for the rulings of the trial court make obvious that he deemed his discretion as to the remoteness or proximity of the proposed evidence controlled by a strict rule of law, and excluded the evidence, not because the defendant's reputation existing at Stoughton two years before the trial was, in his opinion, too remote to have any bearing upon that defendant's character for truth and veracity, but because a rule of law rendered it inadmissible if a later residence and reputation had been acquired elsewhere. Hence the trial court erred, if no such rule of law exists. To the question of its existence, we therefore address ourselves.

Of course, the real question of interest to the jury is whether a witness' character with reference to truthfulness

is good or bad at the time of trial, so that they may judge as to the credit to be given his statements on the witness stand. It is now quite universally recognized that the general reputation of one in the community of his residence is evidence of his character. The reputation receivable in evidence must, of course, be one existing and established before the trial, but how much lapse of time will serve to deprive it of all evidentiary force is quite uncertain, under the authorities. Their tendency is to allow much remoteness in time, on the theory that personal character is a persistent quality, ordinarily changing hardly at all, and never suddenly. In 1 Greenl. Ev. (16th ed.) § 461*d*, the true rule is said to be "that character [reputation] at any preceding time is admissible, provided it is not too remote in time to have real probative value." Decided cases have declared its admissibility after the lapse of many years—up to ten or even more. *Sleeper v. Van Middlesworth,* 4 Denio, 431; *Rathbun v. Ross,* 46 Barb. 127; *People v. Abbott,* 19 Wend. 192, 201; *Snow v. Grace,* 29 Ark. 131; *Watkins v. State,* 82 Ga. 231, 8 S. E. 875; *Holmes v. Stateler,* 17 Ill. 453; *Buse v. Page,* 32 Minn. 111, 19 N. W. 736, 20 N. W. 95; *Morss v. Palmer,* 15 Pa. St. 51; *Sage v. State,* 127 Ind. 15, 27, 26 N. E. 667. From these and other authorities, we cannot doubt that a general reputation established and existing twenty-two months before is not so remote as to be inadmissible on that ground alone. Nor, indeed, have we any reason to suppose that the trial court would have so held. He merely ruled that the intervention of the subsequent residence, and establishment of a provable reputation there, render the former reputation inadmissible, although not so remote but that it would otherwise have probative force. This could be so only on the ground that the former general reputation is no longer any evidence of the real character of the man. For such view we find no support in any of the cases cited, but, on the other hand, we do find much authority to the contrary. 3 Jones,

Ev. § 862; *Hamilton v. People,* 29 Mich. 173, 187; *Coates v. Sulau,* 46 Kan. 341, 343, 26 Pac. 720; *Sleeper v. Van Middlesworth, supra; People v. Abbott, supra; Rathbun v. Ross, supra; Watkins v. State, supra; Stratton v. State,* 45 Ind. 468; *Memphis & O. R. P. Co. v. McCool,* 83 Ind. 392; *Norwood & B. Co. v. Andrews,* 71 Miss. 641, 16 South. 262; *State v. Lanier,* 79 N. C. 622; *Morss v. Palmer, supra.* In substantially all of these cases the witness had maintained a later residence for as long or longer than had the defendant in Oregon. In many of them evidence had been given of an existing reputation at such later place of residence. In all of them it was held that the general reputation existent in the community of his earlier residence was relevant and admissible to prove the actual character of the witness at the time of his giving testimony. The reasoning in support of this view is unanswerable. If the date of the earlier residence and surrounding reputation is recent enough that, according to ordinary human experience, the character which was then a part of the man himself is not likely to have changed, proof of that character at that date is material, and the general reputation then existing tends to prove what that character was. It is, of course, true that reputation does not always coincide with real character. Fortuitous circumstances, some unfortunate or suspicious event, persistency in scandal-mongering by some enemy, may give a bad reputation to a good man. This peril is, however, greatest in the neighborhood of least residence and least intimacy of contact and variety of stress in which the man's qualities have been exhibited. It would be strange doctrine, indeed, if a blameless life through boyhood and early manhood could not be considered as against an unfavorable reputation resulting from a few months' residence among strangers, where the witness' true character may as yet not be understood. We are convinced that no such rule as that applied by the trial court ought to exist; that it would obstruct discovery of the

truth far oftener than promote it. This conception of what the law ought to be having the support of all the authorities we have been able to find, we cannot do otherwise than hold a contrary rule erroneous, and advise the trial court that error was committed in striking out and excluding the evidence as to defendant's general reputation for truth and veracity existing at Stoughton at the time of his residence there.

The second question is not a proper one for certification or answer, under sec. 4721, Stats. 1898. It cannot be answered with certainty without examination of the entire record. *State v. Jenkins,* 60 Wis. 599, 19 N. W. 406; *State v. Gross,* 62 Wis. 41, 21 N. W. 802; *State v. Cornhauser,* 74 Wis. 42, 41 N. W. 959. True, the ruling of the court, being specific error, is presumptively prejudicial. Its certification emphasizes that presumption. Nevertheless there is possibility that it might have been cured in the course of the trial—as, for instance, by subsequent admission of the evidence first ruled out. Whether so cured can only be learned from a complete record, including a bill of exceptions. This we have not before us, and could not assume to examine if we had, under the authorities above cited.

*By the Court.*—The first question reported is answered in the affirmative, and the second is left unanswered.

CITY OF MADISON, Respondent, vs. AMERICAN SANITARY ENGINEERING COMPANY and another, Appellants.

*March 2—July 3, 1903.*

*Municipal corporations: Sewage disposal works: Contracts: Bonds: Construction: Breach: Penalty: "Penal sum": "Liquidated damages": Architects and engineers: Powers and duties: Acceptance: Waiver: Entire contract: Failure of consideration: Evidence:* Ultra vires: *Principal and surety: Release of surety: Material alteration of contract: Extension of time.*

1. The words "penal sum" in that part of a contract or bond providing for the consequences of a breach thereof are ordinarily to be construed strictly, and as meaning a penalty and nothing more, and, in such case, actual damages must be shown. This ordinary import may be overborne by other parts of the contract which demonstrate that the words were used as meaning "liquidated damages."
2. If the sum mentioned in that part of a contract or bond providing for the consequences of a breach be denominated "liquidated damages," that fact will not be conclusive upon courts; if the sum fixed be largely in excess of actual damages, or if it appear that the sum was fixed to evade usury laws or to cloak oppression, it will be construed as a penalty.
3. In such case, where the sum fixed is excessive, and the damages are wholly uncertain and incapable of ascertainment by any known rule, the courts will consider the sum named as liquidated damages.
4. A contract under which an engineering company agreed to instal a sewage purification plant for a city, with certain guaranteed results, provided that, "for the faithful execution of this contract and to make good these several warranties," the contractor should give to the city a bond for $25,000, to the effect that each enumerated warranty was a specific warranty, and the principal consideration of the contract, "and that on the failure of the company to make good any one of said warranties the said bond shall be forfeited to the said city." The bond was in the "penal sum" of $25,000, and was conditioned that if the company fully performed "all" the covenants of the contract it should be void. The bond and contract were drawn and scrutinized by lawyers before acceptance. Some of the numerous conditions of the contract were trivial in their nature, and there was embodied a stipulation that if the plant was

not completed within a certain time the company should forfeit the sum of $25 per day as "liquidated damages." *Held*, that it necessarily appeared that the parties had in mind the difference between liquidated damages and penalty, and that the sum named in the bond must be regarded as a penalty.

5. A contract by an engineering company to construct a sewage purification plant for a city, after providing that the work should be completed in strict compliance with the plans and specifications, stipulated that the engineering company should operate the works for three months after the date of their completion, at its own expense, and, after the expiration of that time, if the plant was working "to the satisfaction of the said city engineers," the city should assume running control and operate it for nine months before accepting the same. The contract then proceeded to specify the degree of purification which the engineering company contracted to produce when the plant was working to its full capacity. *Held*, that the city was contracting for a plant to purify sewage, not a mechanically correct piece of machinery, and was not bound to accept the plant after three months, and give it the nine-months trial if it was mechanically satisfactory, irrespective of the degree of purification of sewage accomplished.

6. In such case, the proof was conclusive and undisputed that the plant completely failed to dispose of the sewage of the city with the results contracted for. *Held*, that the city engineers had no power under the contract to declare themselves satisfied with the plant, whatever may have been their opinion as to their powers and duties, and, irrespective of such engineer's report, the city was not compelled to take control at the end of the three-months period, and lost no rights by refusing so to do.

7. A contract by an engineering company for the construction of a plant for the purification of sewage for a city provided, if the plant failed to operate as agreed, that the city should have the use of the plant free of cost for one year after its refusal to accept the same. The plant was to be operated three months by the company after its completion, and then, if satisfactory to the city engineers, the city was to operate it nine months before final acceptance. On September 29, after three months' operation by the engineering company, the plant was tendered to the city for the nine-months trial, and, on the report of the city engineers, the tender was refused. On January 12, following, the engineering company ceased operating the plant and abandoned it. The city engineers reported these facts, and also that the plant was not giving the guaranteed results,

whereupon the city by resolution reciting the facts and the necessity of disposing of the sewage, but disclaiming any acceptance, took charge of and operated the plant for about a year, until another could be constructed. *Held*, that the city was acting within the contract, and no waiver of any rights under the contract or an acceptance of the plant could be predicated thereon.

8. Where a city contracted for a complete sewage purification plant, guaranteed to produce certain specified results, and the plant as an entirety was a failure, and did not dispose of the sewage with the guaranteed results, there is an entire failure of consideration, notwithstanding some parts of the plant performed their work satisfactorily.

9. In an action for breach of a contract in failing to construct a sewage purification plant so as to accomplish guaranteed results, it is not error to refuse to strike out various analyses of the effluent, because it appeared that such effluent was taken at times when sewage was being wasted, and was not all passing through the filter beds, where it did appear that the samples of the effluent were taken from the proper place at times when the plant was in regular operation, and sewage was passing through in regular course.

10. While taxpayers whose money is about to be spent, or property owners whose land is about to be charged, may challenge the legality of municipal acts, and contracts calling for expenditures, on the ground that the proper legal steps have not been taken, persons who enter into a contract with the city stand in a different position. Such persons cannot make the defense of *ultra vires* or total lack of power on the part of the city to make the contract in question.

11. Where a surety company, by the express terms of its bond, has made a contract with a city a part of the bond, it cannot be heard to say that the city had no power to enter into the contract or did not make the contract in the required manner.

12. A contract with a city for a sewage disposal plant provided that payments should be made as the work progressed, on monthly estimates by *two* designated engineers, but such payments were made on the certificate of *one* engineer alone. A surety company, who had given a bond guaranteeing the contract, interposed such fact as a defense. It appeared that such provision was inserted in the contract for the benefit of the city alone, and that the payments so made were not greater in amount than they should have been if the certificate of both engineers had been exacted. *Held*, that such pay-

ments did not materially alter the contract, nor affect the rights of the surety.

13. Such contract further provided that the time for completion "may be extended only by the previous written consent of the mayor and city engineer for good cause shown." *Held*, that such language did not limit the designated officers to granting only one extension, either by direct terms or by implication.

14. When a contract for the construction of a sewage plant for a city, guaranteed by the bond of a surety company, was entered into, the expectation was that the city would furnish the power for its operation from a certain water power owned by the city. The only reference to the power in the contract was, that the cost of operation "as the city now proposes to operate the plant shall not exceed" a certain sum. After the contract had been entered into the city installed gasoline engines for power purposes, and thereby produced the required power. *Held*, that the terms of the contract were not affected by the change of power so as to release the surety.

APPEALS from a judgment of the circuit court for Dane county: ROBERT G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action at law to recover $25,000 for breach of a bond given to the plaintiff by the defendant engineering company as principal and the defendant fidelity and guaranty company as surety to secure the performance of a contract made by the engineering company with the plaintiff by which the engineering company agreed to construct and install a sewage purification plant for the use of the city and guarantee certain results.

The complaint alleged the making of the contract and bond; also that the engineering company had constructed a plant, and that the plaintiff had paid the engineering company the sum of $25,000 during the progress of the work, in accordance with the terms of the contract, no part of which has been refunded. The complaint further charged that the engineering company had failed to perform its contract, and alleged eleven substantial breaches thereof, and that the plant

as constructed was without use or value to the plaintiff, and demanded judgment for the sum of $25,000 and costs.

The engineering company, by answer, admitted the execution of the contract and bond; the construction of the plant; the payment by the city of $25,000 upon the contract, and that no part thereof has been repaid; but denied all breaches of the contract, and alleged acceptance of the plant by the city. It also counterclaimed to recover the balance of the contract price, amounting to $12,200, and set forth other counterclaims, which are unnecessary to be stated.

The answer of the guaranty company admits the execution of the contract and bond, and alleges that the city accepted the plant; also that the city and the engineering company made certain material changes and variations in the contract, by which the guaranty company has been released from the obligations of the bond.

The plaintiff filed a reply denying the allegations of the counterclaims, and alleged that the engineering company was a foreign corporation, and had not filed a copy of its charter with the secretary of state, as required by sec. 1770*b*, Stats. 1898, and hence could claim no rights against the city under its contract.

The action was tried before a jury. Many of the material facts were undisputed, and much of the proof was of a documentary nature. It appears that the city of *Madison* is located between two small lakes, known as Lake Mendota (sometimes called Fourth Lake), and Lake Monona, which are connected by a small river a little more than a mile in length, known as the Yaharra or Catfish, Lake Monona being the lower lake; that the city had for years had a sewerage system by which the sewage was conducted into these lakes, the far larger percentage being deposited in Lake Monona; that some years prior to the making of the contract and bond in suit the city council had determined upon a change in the method of sewage disposal, so that the same should not be

turned into the lakes, for the reason that the water of Lake Monona was seriously polluted by the sewage discharged into it, and actions were commenced against the city to enjoin the discharge of sewage into that lake; that in October, 1895, McClellan Dodge, city engineer, and Capt. John Nader, also a civil engineer, in response to a request of the city council, submitted plans for the disposal of all of the sewage of the city by means of chemical treatment and filtration; that these plans contemplated the collection of all the sewage of the city by means of intercepting sewers which conveyed the sewage by gravity to the disposal grounds in the northeast part of the city, just across the Yaharra river, there to be chemically treated, and run into tanks for settling, and thence onto specially prepared filter beds of sand three and one-half acres in extent, after which process the purified effluent was to be discharged into the Yaharra river about half a mile above Lake Monona; that the council approved these general plans, and directed the engineers to prepare detailed plans and specifications, which were finally approved by the council in February, 1897; that early in 1897 work was commenced by the city in the execution of these plans, and in October of that year the large intercepting sewer which was to carry the sewage to the works had been partially constructed, and at this juncture John MacDougall, the managing director of the engineering company, came to the city, was fully informed of the proposed change in system, and submitted to the city council a proposition for the installation of a plant for sewage disposal by the use of certain patented devices and processes owned and controlled by the engineering company, known as the "International" process of sewage purification; that this process also contemplated the use of the intercepting sewer and of chemical treatment and settling tanks and filter beds, but that different chemicals were to be used and patented devices installed, whereby quicker action was to be obtained, and very much smaller filter beds made necessary;

that the engineers Dodge and Nader accompanied this proposition with a report recommending the acceptance thereof, and stating the difference between the two plans, as follows:

"The two essential differences in the plans are, first, the use of deep, circular tanks instead of shallow rectangular tanks, in which the precipitation takes place, and the possibility by means of a patented device in connection with the former of removing the sludge without emptying the tank, thus avoiding considerable disagreeable work and the expense thereof, and also the loss of the use of the tank during the operation; second, the much more rapid filtration of the effluent from the precipitation tanks, owing to the use of a powerful oxidizer named 'Polarite,' used in connection with the sand of the filters. By the use of these filters, and the consequent increased rate of filtration possible, the size of the plant is much reduced, the works condensed, the operation simplified, the cost of operation decreased, and at the same time doing away with the necessity of purchasing more land, as the tract now belonging to the city is ample for all time."

After some delays the proposition of McDougall was accepted, and on the 18th day of April, 1898, a written contract was entered into between the city and the engineering company, which after reciting the making of the proposal aforesaid, and making the same a part of the contract, proceeds as follows:

"Now, therefore, it is mutally stipulated and agreed by and between the *American Sanitary Engineering Company* of Detroit, Michigan, and the city of *Madison,* as follows, to wit:

"That the sole purpose of putting in the sewage purification plant is for the purification of the sewage of said city so that the effluent may be turned into Lake Monona without contaminating the water in said lake, or causing or aiding vegetable growth in said lake, and without injury to the fish therein.

"The said engineering company agrees to erect and construct a sewage purification plant on the international sys-

tem for and in the city of *Madison,* on the city property across the Yaharra river and about one hundred feet northeast of the so-called 'Y' of the Chicago & Northwestern Railway, and about four hundred feet northwest of Washington avenue, at a point to be more particularly located by the mayor and city surveyor of said city, on the following terms and conditions:

"The plant to be constructed generally on the plans submitted with the proposal of said company, and accepted and adopted by the common council of said city, and in strict compliance with the detail plans and specifications approved by the city's sewerage engineers and now on file in the office of the city clerk, which are here referred to and made a part of this contract to all intents and purposes as if herein specifically set forth. The plant shall consist of four Candy precipitation tanks, twenty-five feet inside diameter and fifteen feet deep; three polarite filter beds, aggregating sixty-six feet by ninety-two feet outside dimensions; all grading, channels, piping, valves, and other appurtenances complete; the same to have a capacity of treating 1,200,000 gallons of sewage per day; for the sum of thirty-seven thousand and two hundred (37,200) dollars. The work shall be done in strict and full compliance with the plans and specifications submitted with said proposal and the perfected and detailed plans and specifications since approved by the city engineers and now on file in the office of the city clerk. The work of construction shall in every particular be carried on and completed in a workmanlike manner, under the supervision of the said engineers and to their satisfaction. Said engineering company agrees to operate the works for three months after the date of their completion at the expense of said company. If said plant is working to the satisfaction of the said city engineers at the expiration of said three months, the city shall, at its expense, without accepting the same, assume the running control of said plant and shall continue to operate the same as directed by said company for a period of nine months before accepting the same. Said company specifically agrees and warrants to produce a degree of purification in the effluent from the filters, even when the plant is working at its full daily capacity, as follows, to wit:

"(1) The effluent shall be at least as pure in all respects as the effluent from the sewage of the city of *Madison* would be if treated with lime, alum, or copperas, or lime and alum, or lime and copperas, or any combination of these, at the discretion of the city surveyor, and afterwards filtered through five feet of specially prepared beds of sand, as heretofore proposed by said engineers, at the rate by them proposed.

"(2) That when the said purification plant is properly operated the effluent, as it passes from the polarite filter beds, shall be satisfactory to both of said sewerage engineers; that is, McClellan Dodge and Captain John Nader, or the survivor of them, and that on chemical analysis it shall be as pure as the water of Fourth Lake, as shown by an analysis of said water made by Prof. Daniells, of the State University, at the request of the city, in the year of 1888 and published in the water commissioner's report of that year.

"(3) That the effluent passing from said plant may be turned into Lake Monona without in any way contaminating the waters of said lake, without causing or contributing to vegetable growth in said lake other than as pure water may contribute to such growth, and without in any manner doing injury to the fish therein.

"(4) That the operation of said plant shall cause or produce no objectionable or offensive odors or nuisance in or about said plant, the Yaharra river, Lake Monona, or in or about any other place.

"(5) That said purification plant shall work in all other respects in a manner satisfactory to the said engineers of said city.

"For the faithful execution of this contract and to make good these several warranties, the said company shall give the said city a good and sufficient bond in the sum of twenty-five thousand (25,000) dollars, to the effect that each of said warranties is a specific warranty and the principal consideration for the giving of this contract, and that on the failure of the company to make good any one of said warranties, the said bond shall be forfeited to the said city. Said bond shall be given by some reliable fidelity and trust company duly authorized to issue bonds and shall be given before this contract shall be binding on either party, and it shall be duly approved by the mayor and city attorney, and shall be of force and ef-

fect until said plant shall have been duly and finally accepted by the said city.

"The said engineering company agrees that the foregoing prices are to be in full for the plant and that the city shall not be subject to any further charges of any kind whatsoever on any patented article in connection with said plant or chemicals used, excepting the charge for ferozone, as hereafter specified. The said company further guarantees that it will save the city harmless and free from any action at law which may arise in connection with the infringing of any patent in connection with the plant, materal, or chemicals supplied by it.

"Said sanitary engineering company further stipulates and agrees that said purification plant shall have a daily capacity of purifying 1,200,000 gallons of the sewage of the city of *Madison* per day for each day in the year; that said plant shall be completed and ready for operation on or before October 15th, 1898, it being understood and agreed that the above date is of the essence of this contract; that the time for the completion thereof may be extended only by the previous written consent of the mayor and the city engineer, for good cause shown, which cause, together with the original of said consent, shall be filed with the city clerk. It is further understood and agreed that the said company shall forfeit to the said city the sum of twenty-five (25) dollars per day as liquidated damages for the noncompletion of said plant at the time herein agreed upon, unless said time shall be extended as aforesaid; that in making a test of said plant at its full capacity of 1,200,000 gallons per day, such part of said tanks and filters shall be used so as to make them work at the rate that the entire plant would work if receiving 1,200,000 gallons per day, and like tests may be made of the results that would be obtained by the lime, alum or copperas test, with sand filters.

"It is further stipulated and agreed by the said company that the cost of operating said plant, including labor, chemicals and other necessary supplies, as the city now purposes to operate its plant, shall not exceed the estimated cost of the operation of the plant heretofore proposed by said engineers, to wit: the sum of three thousand six hundred (3,600) dollars per year; and said company further agrees that the cost

of operating said plant shall not exceed that sum when purifying 600,000 gallons of sewage per day, it being understood and agreed that said sum includes the cost of ferozone used in such treatment, and that the cost of treating any increase in the sewage beyond that amount shall not exceed the proportion which the amount of ferozone then used shall be to the ferozone used in treating 600,000 gallons at the above figure up to the capacity of the plant. Said company further agrees to furnish to said city ferozone for the operation of said plant for one year at cost, laid down at the city of *Madison,* and agrees thereafter to furnish ferozone for the operation of said plant at a cost that shall not exceed the cost of alum or lime, or copperas, or any combination of these the city might see fit to use, for treating a like amount of sewage with as favorable results, and that the cost of sufficient ferozone to properly treat the sewage of the city of *Madison* shall at no time exceed the sum of fifteen hundred (1,500) dollars per annum for treating 600,000 gallons of sewage per day. Said company further agrees that any extension of said plant or any part thereof shall be made by the said company, its successors or assigns, at not to exceed the relative cost of like work under this contract.

"The said company further agrees that the said purification plant shall be completed in all respects agreeable to the said plans and specifications, under the supervision of the city engineers, at the agreed price of thirty-seven thousand two hundred (37,200) dollars; that the sum of twenty-five thousand (25,000) dollars shall be paid to said company as the work progresses, on the monthly estimates and certificates furnished by the city engineers (an original copy of which shall be placed on file with the city clerk), it being understood that not more than twenty-five thousand (25,000) dollars shall be paid hereon until after the completion of said work by the said company and the final acceptance of said plant by the city of *Madison;* that the balance of said contract price, to wit, the sum of twelve thousand two hundred (12,200) dollars, shall be paid to the said company on or before one year after the final acceptance of said work, and that said sum shall draw interest at six per cent. after the completion of said works, if said works are finally accepted by said city, it being understood and agreed that the said

sum of twelve thousand two hundred (12,200) dollars shall not become payable until the acceptance of said plant by the city of *Madison.*

"It is understood and agreed that at the expiration of the year of trial herein provided for and before the said works shall be finally accepted by the said city, the effluent as it leaves the filter-beds shall be satisfactory to Dr. Phil Fox, health physician of said city, Hon. Robert G. Siebecker, judge of the Dane county circuit court, and McClellan Dodge, city engineer of said city; that the analysis of the effluent herein provided for shall be made by either Dr. Babcock or Prof. Daniells of the State University, as the gentlemen above named shall select, and the effluent on such analysis shall be found to be equal to the waters of Lake Mendota, as hereinbefore provided; that the said Dr. Phil Fox, Robert G. Siebecker and McClellan Dodge shall be satisfied that there shall be no nuisance in or about said plant, the Yaharra river, or Lake Monona, caused by the operation of said plant, and that if either of said three persons named, for any reason or at any time, shall decline or be incapacitated to act as herein provided, a substitute shall be chosen by agreement between John A. Aylward, representing the city of *Madison,* and H. W. Chynoweth, representing the said company on the one side, and Burr W. Jones, John M. Olin, and R. M. LaFollette, representing the plaintiff upon the other. If either of the chemists herein named shall refuse or fail to serve, then the said Fox, Siebecker and Dodge, or their substitutes, as herein provided for, shall select some other chemist to perform the said services herein provided for.

"As the sewage system of said city is so constructed that all sewage is conducted to said plant, it is understood and agreed that the operation by the city of said plant before final acceptance, shall in no manner be construed as an acceptance of the said purification plant, or any part thereof, and shall in no manner and at no time work a waiver of any of the rights of the city as against the said company, or its successors.

"The said company further agrees to save the city harmless from all claims of injury or damage, or claims of whatsoever nature, in any manner growing out of this contract.

Before final payment shall be made the company shall satisfy the city that all claims for labor, damages, implements or materials have been paid and satisfied in full.

"It is understood and agreed that no extra work shall be allowed or paid for unless the same shall have been done on the written order of the city engineer and the mayor of said city and the price agreed upon and signed by both parties hereto prior to the doing of such work, and filed with the city clerk. The said company assumes all risks arising from any latent defects that may be in the soil where the said works shall be located as aforesaid, but it shall have reasonable compensation, to be fixed by the said city surveyor, for handling the water in said work over what the same would have cost had this contract been carried out when said company made its said proposal.

"In consideration of the foregoing agreements, covenants and warranties to be performed by said company, the city of *Madison* agrees to pay to said *American Sanitary Engineering Company* the sum of thirty-seven thousand two hundred (37,200) dollars for the full and satisfactory completion of said plant on the terms and in the manner and at the time as herein set forth, it being understood and agreed that the said sums hereinbefore mentioned shall become due and payable only on the conditions herein set forth.

"It is also understood and agreed that should the said company fail to complete the work as herein agreed on, or should the said plant fail to operate as hereinbefore specifically agreed upon, the said company shall have no claim upon the unpaid contract price and the said bond shall be forfeited to the city of *Madison,* and in such case the city shall have the use of said plant, free of cost, for the period of one year after the city's refusal to accept the same, and in such case the city shall also have the option of purchasing any portion of said plant at the actual cost price of such portion, exclusive of the cost of any patented article or device therewith connected.

"It is further mutually agreed that the city is under no obligation to the said company to use ferozone as the coagulent in the operation of said plant, or to use polarite in its filter beds.

"It is further hereby stipulated and agreed by and between the parties hereto that the price named for the construction and completion of said plant and works as to be paid to the company by the city was fixed and agreed to by the company not as the price at which the said company contemplated or now contemplates establishing similar works; that the said price was fixed as above in said contract by reason of the fact that no such plant or works have up to this time been built or constructed in this country and none such are in operation here, although such system is in successful operation in other countries; that the inducement to the company in fixing the said price at said figure is solely and mainly that it might immediately construct and put into operation here in the city of *Madison* a model plant and works for the treatment of the sewage of the city on the international plan and make such plant and works an advertisement of such system and to which they could refer and which they could show to the citizens and officers of other municipalities contemplating putting in a system of works for the treatment of sewage, as works and a plant in successful operation; that unless the construction of the said works can be begun by the 15th day of May, 1898, and proceeded with to completion, the foregoing inducements will be removed as a consideration for the price fixed in this contract and the company shall be obliged to erect works in some other point in this country for a model and an advertisement; that if by reason of suits now pending or that might hereafter be instituted, by which the said company would be prevented from commencing the work under this contract on or before the 15th day of May, 1898, and proceeding to the completion thereof without interruption, then and in that case the contract price mentioned herein shall not be binding on the said company and it shall be necessary for the said company and the said city to agree upon a new contract price for the work herein contemplated to be performed prior to the commencement of such work. It is understood and agreed that this contract shall not be assigned without the consent of the said city."

It further appears that, in order to secure the fulfillment of the terms of this contract, the bond in suit was executed

June 27, 1898, and accepted by the city in July, 1898, which bond is in the penal sum of $25,000, and conditioned as follows:

"The condition of this obligation is such, that whereas, the above-named *American Sanitary Engineering Company,* a corporation organized and doing business under the laws of the state of Michigan, has entered into a contract with the said city of *Madison* for the purpose of furnishing all the material and performing all the work and other agreements, covenants and warranties in said contract contained, for the erection and operation of a sewage-purification plant for and at the said city of *Madison,* according to said contract and the plans and specifications incorporated therein and in accordance with all the terms of said contract, which said contract is hereto attached and made a part hereof as if herein fully set forth:

"Now therefore, if the said *American Sanitary Engineering Company* shall in all things faithfully and fully keep and perform all the covenants, conditions, warranties and agreements and all things of every nature whatsoever by it, the said *American Sanitary Engineering Company,* to be performed and kept in accordance with the terms and conditions of said contract and the said plans and specifications mentioned in said contract between the said city of *Madison* and the said *American Sanitary Engineering Company,* bearing date the 18th day of April, A. D. 1898, then this obligation is to be void, otherwise of full force, virtue and effect."

The engineering company commenced building the plant in June or July, 1898. October 14, 1898, the mayor and city engineer executed a written extension of time for the completion of the work until December 15, 1898, giving as reasons that it had been impossible to commence work until July, and that the grounds were not in as good condition for work as had been anticipated. On the 15th day of December the time for completing the contract was again extended in writing by the same officers until February 1, 1899. The plant was practically completed by January 10, 1899, but it seems that it was not considered wise to start the works in

midwinter, and it was not until May 19, 1899, that the sewage of the city was turned into the plant and its operation was begun. As completed, the plant was composed of two separate parts, one built and operated by the city, and one built and operated by the engineering company. That part built by the city contained the power for operating the plant, the press for pressing the sludge, the receiving well for the sewage, the mixing tank for mixing chemicals, and the well into which the sludge was drawn off from the chemical precipitation tanks, and from which well it was pumped into the press and pressed into cakes. The buildings erected by the engineering company consisted of four circular precipitation tanks, about fifteen or twenty feet in diameter, and about the same in depth. Next to the precipitation tanks were three oblong rectangular tanks built of masonry, which contained the filter beds. The filter beds were constructed by laying on the bottom tile, and on top of the tile crushed granite, polarite, gravel, and sand, so as to make a porous filter, and from which the sewage after it passed through the chemical precipitation tanks flowed. The course of the sewage through the plant was as follows: The sewage was delivered into a deep well under the power house, called the "sewage well," being delivered from the sewers by gravity. Chemicals consisting of ferozone, sometimes, most generally, lime, were delivered and mixed with the sewage in the well, and the sewage was then pumped from the sewage well into a pipe, which conveyed it to the circular precipitation tanks. The sewage entered these precipitation tanks at the bottom, and gradually flowed to the top of the tank. During this process whatever solid matter had been precipitated by chemicals collected at the bottom, from whence it was pumped by a patented device into the sludge well, which was in the part of the plant constructed by the city. The supernatant fluid in the precipitation tanks, as it rose above a certain level, was conveyed by channels prepared in the masonry, by gravity, onto the top of

the filter beds, and from thence it passed by gravity through the filters, and was collected at their bottom into a pipe called the "effluent pipe." This pipe at first discharged into the marsh surrounding the plant, but afterwards was connected with a pipe or channel which conveyed it directly into the Yaharra river. The sludge which was collected in the sludge well was pumped into a press called the "sludge press," and the excess of water in the sludge extracted by pressure, and this water was run back again into the sewage well for re-treatment. The sludge, after pressing, was deposited in the marsh. As the work progressed, estimates and certificates were given to the engineering company from time to time, and payments made upon the contract, until the entire amount of $25,000 was paid, the last estimate being given July 12, 1899. These estimates were all signed by Mr. Dodge alone, though Capt. Nader was aware that they were given. When the operation of the plant was first begun the engineering company used ferozone as a precipitant, but it was found impracticable to press the sludge produced, and after about six weeks lime was substituted, and the use thereof continued, with the result that the sludge could be readily pressed, but was largely increased in quantity. The plan for cleaning the filters also failed to work successfully, and other means were devised by which large amounts of water were wasted. September 28, 1899, the engineering company, having operated the works more than three months, tendered the same to the engineers under that clause of the contract providing that if the plant be then working to the satisfaction of the engineers the city shall assume control and operate the same for nine months. Thereupon, and on the 17th of October, 1899, the engineers made the following report to the city council:

"Gentlemen: The *American Sanitary Engineering Company* have operated the sewage disposal plant for three months, and some time since tendered us, under the terms of its contract with the city, the running control of the plant.

Since then we have made an examination of the workings of the plant, although we have had a general knowledge of what has been going on there all the time.

"The plant as installed has been completed in a workmanlike manner and to our satisfaction, except in one or two minor matters that the company will remedy before the time for final acceptance.

"As at present operated the plant is working to our satisfaction, to this extent, that it is producing a reasonably good degree of purification in the effluent, and is not causing, and when properly handled we believe will not cause, any objectionable odor or a nuisance of any kind.

"While the plant is not yet reaching the results guaranteed by the contract, yet we believe that the plant is doing such work as warrants us in assuming the running control of it at this time. Under the terms of the contract the city is given nine months in which to test the practical workings of the plant before it is called upon to decide whether it shall finally accept it or not. As we understand the contract, the city assumes no risk, and waives or forfeits no rights, in assuming the running control of the plant at this time.

"While the plant is doing good work, we are satisfied that during the period of trial it can be made to do still better work.

"Without waiving the right of the city to insist on a full and strict compliance on behalf of the company with all the terms of the contract, we recommend that the city assume the running control of the plant at this time, under the terms and as provided by the contract."

Prior to the making of this report the engineers had asked the engineering company for chemical analyses of the effluent, but they had not been furnished, and the engineers proceeded to cause analyses of the effluent to be made during October and November by the experts named in the contract, and by other experts, all of which showed that the effluent produced was not as pure nor substantially as pure as that guarantied by the contract. The city declined to take charge of the works. December 8, 1899, the city council directed the sewerage engineers to report whether the plant was working

to their entire satisfaction, and in response to this Mr. Dodge reported on December 13th as follows:

"Gentlemen: In compliance with your instructions of the 8th inst. I have the honor to submit the following report concerning the sewage disposal plant:

"Two months ago, when the sewerage engineers reported to the council that the sewage disposal plant was running to their satisfaction to a specified extent, and recommended that the city assume the running control thereof in accordance with the terms of the contract, the plant had at all times been able to care for, and had cared for, all the sewage received at the works; there had been no serious clogging of the filters, and although it was evident that the filters as operated had not sufficient capacity to properly treat the guarantied amount of sewage, viz. 1,200,000 gallons per day, the question of capacity could not properly be taken into consideration at that time.

"The contract does not specify that any test of the plant or analysis of the effluent thereof shall be made at the end of the three-months period, nor that the guarantees must be reached at that time, and we were advised that it was not necessary that said guarantees should be fully attained before the city could with perfect safety assume the running control of the plant. Nevertheless we were careful to state that the plant was not working to our entire satisfaction in order that there might be no misunderstanding, that the city's rights might in no way be jeopardized, and the city be left free to act as it deemed best.

"Since said report was made, the volume of sewage reaching the plant has increased with the addition of new territory, and the filters, as operated, have not been able to care for and have not at all times cared for all the sewage received at the works.

"In so far, therefore, as this is true, the plant is working in a lesser degree to my satisfaction than it was at that time, although now, as then, parts of the plant are working in a most satisfactory manner."

On the same day the council appointed a committee to confer with the officers of the engineering company, and see if the defects complained of could be remedied. This commit-

tee met the officers of the company, and the latter agreed to put in certain additional pumps, which it was thought would obviate difficulties experienced in the introduction of the lime and the washing of the filters, the mayor agreeing to recommend the payment of the expense of these changes if the plant was finally accepted. These changes were made, but the city still declined to take charge, and on January 12, 1900, the engineering company withdrew their men, and declined to operate the plant any longer. On the same day the engineers reported this fact to the common council, and, further, that the plant was not operating to their satisfaction, nor in compliance with the terms of the contract, and the council passed the following resolution:

"Whereas, the *American Sanitary Engineering Company* of Detroit, Michigan, has heretofore entered into a contract with the city of *Madison* for the construction of a sewage disposal plant in the city of *Madison;* and

"Whereas, said company has not constructed said plant as in said contract provided; and

"Whereas, said company has failed to comply with the terms of said contract in several essential and important particulars, among others that the cost of operating said plant is in excess of the guaranteed cost of operation; that the degree of purification is not equal to that guaranteed in said contract; that the capacity of the plant is not as guaranteed, and that in other respects said plant does not comply with said contract; and

"Whereas, the construction of said plant, the manner of operation, and the results obtained are not in compliance with said contract and are not and have not been to the satisfaction of the city engineers and are not satisfactory to the city of *Madison;* and

"Whereas, in reliance with the faithful performance of said contract the city has arranged its entire sewer system at great cost, so that all the sewage of said city is now conducted to said plant, where of necessity it must be treated and disposed of; and

"Whereas, the said company has neglected to comply with the terms of said contract; and

"Whereas, said city is now informed that said company, without tendering said plant to the city, has absolutely abandoned said plant, thus allowing all the sewage of said city to accumulate at said plant, and which condition, if allowed to remain, will result immediately to the great injury of said city and danger to people thereof.

"Now, therefore, be it resolved, that by reason of the necessity that exists, without accepting said plant or any part thereof, or waiving or intending to waive any of the rights of said city under the terms of said contract, and without waiving its right to insist on a full and strict compliance by the said company with all the conditions of said contract by it to be performed, the city surveyor be and hereby is instructed to take charge of said plant, abandoned as aforesaid, and operate the same until otherwise ordered.

"And be it further resolved, that unless the said company shall within a reasonable time from the date hereof again assume charge of said plant, and proceed with all diligence to fulfill the terms of said contract, the bond in the sum of twenty-five thousand (25,000) dollars of the *United States Fidelity and Guaranty Company* of Baltimore, Md., given by the said *American Sanitary Engineering Company* for the faithful performance of its said contract, shall be and become forfeited to and the property of the city of *Madison.*

"And be it further resolved, that a copy of this resolution be forthwith served on the said *American Sanitary Engineering Company,* and a copy thereof be forwarded to the *United States Fidelity and Guaranty Company,* Baltimore, Md."

In pursuance of this resolution, the city took charge of the plant, and it was operated under the direction of Engineer Dodge till April 12th, in the same manner as the engineering company operated it. During this time the filters were incapable of filtering the effluent which came to them from the precipitation tanks, so that large amounts of the liquid were necessarily daily discharged from the tanks without filtration. During this time the cost of operating the plant was at the rate of $6,466.56 per year. Prof. F. E. Turneaure succeeded Mr. Dodge as city engineer in May, 1900, and he assumed operation and control of the plant.

Under his control the results were practically the same as before. The precipitation tanks were sufficient in capacity, but the filter beds were incapable of filtering the effluent received, so that a large quantity of sewage, amounting to about one third of the average flow, necessarily turned into the effluent pipe without filtration. Turneaure ceased to use the filters November 28, 1900, because their value was not sufficient to warrant the expense of operating them. He ceased to use the entire plant January 1, 1901. During his management the cost of operating the plant was $6,515 per year. He took samples of the sewage and effluent in July and August, and caused analyses to be made thereof. The tanks and filter beds have not been used since January 1, 1901. For several months the sewage was turned directly into the Yaharra, and after that time the city installed a plant for the treatment of sewage by a different method, which it has since used.

It appeared also that the defendant guaranty company on the 27th of June, 1898, received a bond in the sum of $25,000, conditioned to indemnify it from all liability incurred by reason of signing the bond in suit, which bond was signed by the engineering company, and various private persons, who justified in the aggregate sum of $80,000, and that the defendant guaranty company produced this bond on the trial and tendered it to the plaintiff, duly assigned, and that the tender was refused.

The evidence introduced by the defendants did not controvert in any essential respect the evidence showing the substantial breaches of the contract. The engineering company introduced evidence tending to show that the engineers Dodge and Nader agreed on October 16, 1898, to take charge of the works on behalf of the city on the following day, but this was denied by the engineers. The guaranty company introduced evidence tending to show that the city did not let the contract to the lowest bidder, nor by vote of two-thirds of all of the

members of the council; also that it had no knowledge of certain alleged changes in the contract claimed to have been made between the city and the engineering company.

Motions to direct a verdict were made by the plaintiff and by both defendants. The court directed a verdict in favor of the plaintiff for $25,000, and interest from the time of the commencement of the action, and from judgment entered in accordance with the verdict so directed the defendants separately appeal.

For the appellants there was a brief by *H. W. Chynoweth* and *Lamb, Richmond & Lamb,* for the *American Sanitary Engineering Company;* briefs by *Lamb, Richmond & Lamb,* for the *United States Fidelity & Guaranty Company;* and oral argument by *Mr. Chynoweth* and *Mr. C. F. Lamb.*

For the respondent there was a brief by *Rufus B. Smith,* city attorney, *John A. Aylward,* and *R. M. Bashford,* and oral argument by *Mr. Aylward.*

WINSLOW, J. The first serious question debated by the parties is whether the sum named in the bond in suit is a penalty, or whether it is liquidated damages. The plaintiff claims that it must be treated as liquidated damages, while the defendants maintain that it is strictly a penalty, and that although substantial breaches may have been shown the plaintiff cannot recover, because it has not shown the amount of damages resulting from such breaches.

It is well understood that the words "penal sum" in that part of a contract or bond providing for the consequences of a breach thereof are ordinarily to be construed strictly, and as meaning a penalty and nothing more, and that in such case actual damage must be shown, and it is also understood that this ordinary import may be overborne by other parts of the contract which demonstrate that the words were used as meaning "liquidated damages." *Yenner v. Hammond,* 36 Wis. 277. So, also, if the sum be denominated "liquidated dam-

ages," this fact will not be conclusive upon the courts; but if the sum fixed be largely in excess of actual damages, or it appear that the sum was fixed to evade usury laws or to cloak oppression, the courts will construe it as a penalty. *Berrinkott v. Traphagen,* 39 Wis. 219; *Seeman v. Biemann,* 106 Wis. 365, 84 N. W. 490. It is also said that where the sum fixed is excessive, and the damages are wholly uncertain and incapable of ascertainment by any known rule, the courts will consider the sum named as liquidated damages. See cases cited above; also *Walsh v. Fisher,* 102 Wis. 172, 78 N. W. 437; *J. G. Wagner Co. v. Cawker,* 112 Wis. 532, 88 N. W. 599.

Tested by these general principles, we are convinced that the sum named in the bond in the present case must be regarded as a penalty. In the first place, it is named as a "penal sum," which is the appropriate language for the designation of a penalty, and this fact has considerable significance when the agreement or bond is drawn and scrutinized by lawyers before acceptance, as in the present case. In the second place the bond is given to insure the performance of "all the covenants, conditions, warranties, and agreements" contained in the principal contract, which are quite numerous, and some of which are trivial in their nature. It is very manifest that, in the absence of language to that effect, the penal sum named cannot be construed as liquidated damages for the breach of one covenant or agreement and a penalty only for the breach of others. The agreement provides that the company shall save the city harmless from all claims or injury or damages growing out of the same, also that before final payment the company shall satisfy all claims for labor, damages, or materials, also to furnish all ferozone for the operation of the plant for a year at cost, and that the cost of ferozone thereafter shall not exceed a certain amount. Suppose that any one or all of these agreements be breached, the damages suffered would be readily ascertainable, and if such

damages only amounted to a few hundred or even a few thousand dollars could it be reasonably argued for a moment that the entire penal sum of the bond must be recovered? Plainly not, yet such must be the result if the damages are liquidated. Another fact seems very significant, if not controlling, upon the question of the intent of the parties. The agreement provides that if the plant be not completed within the time fixed (or the time as extended in writing) the company shall forfeit the sum of $25 per day as liquidated damages for such default. This demonstrates that the parties had in mind the difference between liquidated damages and penalty, and presumably used both terms advisedly. Had the bond been given simply to insure the furnishing of a plant which would treat the city sewage with certain results, the argument that the sum named was intended as liquidated damages would have far greater force because the damages for breach of that agreement might be quite difficult of ascertainment, but given, as it was, to insure the performance of many different covenants and conditions, some of which are in their nature unimportant, and whose breach would inflict only trifling loss, we are compelled to construe the sum named in the bond as a penalty and nothing more.

Starting from this basis, the question presented is whether the plaintiff proved without dispute that it suffered damage to the amount of $25,000. The plaintiff proved without dispute that the sewage disposal plant erected by the engineering company not only technically, but substantially, failed to comply with the terms of its contract. Neither the company nor the city was ever able to operate the plant so that it would treat the city's sewage and obtain the guarantied results, or even an approximation of such results. The proof was conclusive and undisputed that the plant completely failed to dispose of the sewage of the city with the results contracted for. It was admitted that the city had paid the company $25,000 during the progress of the work. If, as claimed by the re-

spondent, there has been an entire failure to perform, and the city has in legal contemplation received nothing for its money, then damages to the extent of $25,000 have been proven; otherwise not. This is really the main question in the case, and the decisive question so far as the defendant engineering company is concerned. The appellants contend that the evidence shows that the plant was of some value, though some of the warranties may have been breached; that the proof also shows that the engineers were satisfied with the working of the plant October 16, 1899, and that it was then incumbent on the city under the contract to take the plant and give it nine months' trial; that the city had no right under the contract to take possession of the plant in January, 1900, and operate it for nearly a year; that such use was outside of the contract entirely; and that the city has thus received some benefit from the plant by use thereof as well as from its permanent retention.

The contention that the engineers were satisfied with the plant October 16, 1899, and that it was then the duty of the city under the contract to take the plant and operate it, requires examination and construction of the terms of the contract. The contract, after providing that the work shall be completed in strict compliance with the plans and specifications, further provides that the engineering company shall operate the works for three months after the date of their completion, at their own expense, and if at the expiration of that time the plant is working "to the satisfaction of the said city engineers" the city shall assume control and shall operate the same for nine months before accepting the same. The contract then proceeds to specify the degree of purification which the company contracts to produce when the plant is working to its full capacity.

The appellants contend that the contract does not mean that the plant should be doing the full work guarantied at the end of the three months in order to justify the engineers

in pronouncing it satisfactory, but simply that the engineers should think it "good enough to try" at that time. In effect, the claim is that if it was mechanically satisfactory, and if the sewage was going through it in some shape, the engineers were entitled to pronounce it satisfactory for the purpose of the nine-months trial, and that they did in fact so pronounce it. We cannot agree with these contentions. The mechanical workings of the plant were of course important, but every wheel might turn with the regularity of clockwork, and every valve and other device do its work with precision, and yet the sewage might come out of the operation as impure as it went in. The city was contracting for a plant to purify its sewage, not a mechanically correct piece of machinery. The contract shows the great anxiety felt to reach this end. It is not reasonable to suppose that in view of this important and overshadowing purpose that it was intended that the engineers should simply look over the mechanical operation of the various devices, and if this was satisfactory should then proclaim that the plant was working to their satisfaction, notwithstanding the effluent might be loaded with impurities, nor do we think that the words will bear that construction. A purification plant which does not purify cannot be a satisfactory plant. While it may be that slight irregularities or defects ordinarily incident to the operation of newly installed machinery and devices, or a trifling failure to come up to the full standard of excellence required, would not prevent the engineers from deciding that it was working to their satisfaction, we cannot subscribe to the idea that they had any power to make that declaration if there was a substantial failure of the plant to do the work as guarantied. This would mean that the city was to take an imperfect plant and experiment with it, and try to remedy its defects, and itself do what the contractors had agreed to do and failed. The city authorities contracted to receive a perfect and completed plant; and to operate it for nine months, in order to satisfy

themselves that it was perfect and substantially in accordance with their contract. They did not agree to allow alleged experts to try an experiment upon the city with new and strange devices, and take that experiment off from the hands of the experts before it was successful, and themselves enter the field of experiment and attempt to remedy defects. This being our construction of the contract, it is plain that the engineers had no power under the contract to declare themselves satisfied with a plant that was not substantially purifying the sewage of the city in the manner guarantied. The analyses which were made of the effluent produced abundantly show that the plant never at any time accomplished the guarantied results in the way of purification of sewage nor anything approximating those results. The report of the engineers dated October 17, 1899, affirmatively states that the guarantied results were not then reached, and all the evidence bears out the statement. Therefore whatever may have been the opinion of the engineers as to their powers or duties it is certain that the time never arrived when the plant operated to the satisfaction of the engineers within the meaning of the contract. Thus we reach the conclusion that the city was not compelled to take control of the plant at the end of the three-months period, and lost no right by refusing so to do.

The city did, however, assume control of the plant January 12, 1900, and operated it for nearly a year, and the question of the effect of these acts is still to be considered. It appears without dispute that this action was taken because of the abandonment of the plant by the company, and with the distinct statement that it was not accepted by the city. Thus the act seems plainly to be brought within that part of the contract which distinctly provides that in case the plant shall fail to operate as agreed the city shall have the use of the plant free of cost for one year after its refusal to accept the same. Irrespective of this provision, however, it would seem extremely doubtful whether the city's rights would be

in any way affected by the fact. The situation was extraordinary. By the construction of intercepting sewers, all of the city sewage was being taken to the plant. The sewerage system of a city must of necessity operate continuously. The city, it would seem, had no choice in the matter. Its sewage must move on. It must move through the plant, or it must be discharged in a raw state into the Yaharra river, and thence into Lake Monona, with the result of creating a nuisance, and subjecting the city to lawsuits, and its citizens to danger of disease and malaria.

To say that the acts of the city in thus assuming control of the works, and using them for a time, until other means of disposing of the sewage could be provided, constituted a waiver of any rights under the contract or an acceptance of the plant, is to torture acceptance and consent from acts done practically under duress. The works were on the city's own land. They were abandoned by the contractors while still absolutely inadequate and incomplete. There may doubtless be a voluntary acceptance of an incomplete building upon one's own land, but mere use thereof under circumstances of necessity such as are present here does not constitute acceptance or waiver of the terms of the contract. *Malbon v. Birney,* 11 Wis. 107.

The question whether the evidence showed the plant to be of no value, so that there was a total failure of consideration for the sums paid by the city, is now to be considered. The evidence tended to show that the settling tanks were sufficient in size and performed their work fairly well, but that the filter beds were entirely ineffective and insufficient in size, and continually became clogged, whether operated by the company or by the city, and they were finally abandoned as practically useless. From these facts the argument is that there was something of value in the tanks, at least, which might and ought to have been utilized by the city in reduction

of damages, and thus that it cannot be said that the consideration has wholly failed.

Were this an action by the engineering company against the city for the contract price, there could be no recovering notwithstanding the fact that the tanks might be in accordance with the contract and of some value, for the reason that the contract is entire, and there has not been complete performance. This rule, however, is not necessarily applicable to this case. We do not understand that money paid to a contractor during the progress of the work can be recovered back merely because the contractor fails to complete the entire work. In order to recover such money back, there must be either an agreement to that effect or an entire failure of the consideration.

The rule is familiar that where personal property is sold under a warranty which is breached, and the property is retained by the vendee, and is of value for any purpose, that value may still be recovered, and if a comparatively small outlay will remedy the defect the vendee's duty is required to make that outlay, and the expense of making such remedy will be the proper measure of the vendee's damages. *J. I. Case P. Works v. Niles & S. Co.* 107 Wis. 9, 82 N. W. 568. The reason of this rule is evidently that the vendee has the right and power to return the article if he chooses, and that his failure to exercise that right constitutes an election by the vendee to appropriate to his own use whatever real value there is in it.

Is this rule or anything analogous to it appropriate in the present case? We think not. In case of permanent erections on real estate like the present, there can be no return of the property, especially where the vendor abandons it, and refuses to have anything more to do with it, on the claim that it fulfills the contract. So the fundamental reason of the rule is lacking. But there are other most persuasive considera-

tions. The city contracted for a complete sewage disposal plant, not for precipitation tanks or for filter beds separately. In order to discharge its duty to its citizens, it must have a complete plant. It made a contract with alleged experts to obtain such a plant, and the plant was to consist of patented devices and operate by patented processes, of which the engineering company claimed that it had exclusive control. It was constructed, but failed to operate. Suppose some part of the machinery was perfect and adapted to the purpose, or was of some value as scrap iron, was the city compelled to spend perhaps large sums of money in endeavoring to obtain other appliances or devise other means to supplement the few perfect parts? While the continual stream of sewage was pouring through its main intercepting sewer at the rate of 600,000 gallons or more a day, demanding disposal, must the city, in order to preserve its rights, enter the unknown field of experiment, and try to patch up a sewage disposal plant, and thereby run the risk not only of complete failure at the end, but also of infringement of patents, and consequent litigation, and of spreading sickness and disease among its citizens? These questions seem to us to admit of but one answer, and that in the negative, and we have no hesitation in so holding. This answer necessarily results in the conclusion that the plant in question was proved to be worthless when it was proven beyond contradiction that it did not dispose of sewage with the results guarantied or approximately those results. The city was entitled to treat it as a complete failure of consideration, notwithstanding some parts performed their work satisfactorily. Nothing could be done with it but to abandon it entirely, as was done. These considerations practically dispose of the case so far as the engineering company is concerned. It is true that a claim was made that the evidence of the various analyses should be stricken out, because it appeared that the effluent was taken at times when sewage was being wasted, and was not all passing through the filter beds.

We find, however, that the samples of effluent were taken from the proper place at times when the plant was in regular operation, and the sewage was passing through in regular course, and thus the samples fairly showed the results reached by the plant.

There are several additional contentions raised on behalf of the surety company which require treatment.

1. It is said that the contract with the engineering company was void because the city charter requires that all work for the city shall be let to the lowest bidder, or, in the absence of competition, that a two-thirds vote of the council shall be necessary to authorize the work, and that it was proven in this case that neither course was adopted. Of the same nature is the objection that the contract was for the use of patented processes and articles, and that the city cannot contract for such use where the charter requires competition, and there is no definite price for the use of the patent for which it is offered to all. *Ricketson v. Milwaukee,* 105 Wis. 591, 81 N. W. 864.

Conceding that the facts are as claimed, there is a very plain misapprehension here of the application of the principles relied on. Taxpayers whose money is about to be spent, or property owners whose land is about to be charged, may challenge the legality of municipal acts and contracts calling for such expenditures on the ground that the proper legal steps have not been taken, but persons who enter into a contract with the city stand in a different position. Such a person cannot even make the defense of *ultra vires* or total lack of power on the part of the corporation to make the contract. *Security Nat. Bank v. St. Croix Power Co.* 117 Wis. 211, 94 N. W. 74. If the defense of *ultra vires* cannot be made, it is very evident that the lesser claim of failure to execute a given power in the statutory way must also be ineffective. By the express terms of the bond the surety company has made the contract a part of the bond. They have con-

tracted with the city, and cannot now be heard to say that the city had no power to enter into the contract or did not make the contract in the required manner.

2. It is said that the surety company was released by the payments of money to the engineering company on the contract under the certificate of but one engineer when the certificate of both engineers was required by the contract. In *Stephens v. Elver,* 101 Wis. 392, 77 N. W. 737, and *Cowdery v. Hahn,* 105 Wis. 455, 81 N. W. 882, it was held that the premature payment to contractors of the contract price of a building will be considered as materially altering the contract so as to release sureties, providing such premature payment be substantial, and not a mere trifling deviation from the contract. The present case, however, is not a case of premature payment in the sense that the money had not been earned, but simply a case where the payment was made without the full certificate required. It has been held that such a payment will not release the surety "when it is manifest that the provision was inserted in the contract for the benefit of the owner alone, and that the payments so made were not greater in amount than they should have been if the certificate had been exacted." *Smith v. Molleson,* 148 N. Y. 241, 42 N. E. 669. These words were cited with approval by this court in *Grafton v. Hinkley,* 111 Wis. 46, 86 N. W. 859. All the elements above required were present in this case, and hence the payments did not materially alter the contract nor affect the rights of the surety.

3. It is contended that the contract was materially altered by the second extension of time granted by the city, because the contract only provides for one extension of time. The contract says that the time for completion "may be extended only by the previous written consent of the mayor and city engineer for good cause shown." This does not say that there can be but one extension either in direct terms or by implica-

tion. Such a construction is not warranted by the words, and is, in our judgment, unreasonably narrow.

4. It appears that the power for the operation of the machinery of the plant was to be furnished by the city. When the contract was made the expectation was that this power should be water power obtained from a dam owned by the city at the head of the Yaharra river, but the contract contains no stipulation to that effect. The only clause of the contract, even distantly referring to the question of power, is the clause that the cost of operating the plant "as the city now proposes to operate its plant shall not exceed" the sum of $3,600. It seems that the city authorities concluded that power could be furnished cheaper by gasoline engines than by utilizing the water power; hence they installed a gasoline engine for the purpose, and thereby produced the required power. There is no claim that it was inefficient or failed in any respect to furnish adequate power. The terms of the contract between the parties were plainly not affected in the least by the change of power.

This disposes of all of the separate contentions of the surety company which we find it necessary to discuss, and relieves us from the consideration of the effect of the indemnity bond which the surety company took from the engineering company.

*By the Court.*—Judgment affirmed.

SIEBECKER, J., took no part.

# PINKERTON, Respondent, vs. J. L. GATES LAND COMPANY, Appellant.

*March 27—July 3, 1903.*

*Tax sales: Validity: Affidavit of publication of notice: Ejectment: Plaintiff's recovery on defects in tax title: Amount payable as condition of judgment.*

1. Under sec. 1130, Stats. 1898 (providing that notice of a tax sale shall be published four successive weeks), and sec. 1132 (providing that the printer who publishes such notice shall, immediately after the last publication thereof, transmit to the treasurer of the proper county an affidavit of such publication made by some person to whom the fact of publication shall be known; and that no printer shall be paid for any such notice who shall fail so to transmit such affidavit within six days after the last publication thereof), a notice of a tax sale was published five times, but the last insertion in the newspaper was less than one week prior to the sale. The affidavit of the publication of such notice was transmitted to the treasurer within six days after the fifth insertion, but more than six days after the fourth. *Held*, that the fifth publication, being less than a week prior to the sale, could not be regarded as a legal publication within the meaning of sec. 1130, and must be rejected as mere surplusage.
2. In such case, there being a failure to transmit the affidavit of the printer within the time required under sec. 1132, the county was not liable for the printer's fees for publication, and hence the printer's fee of twenty-five cents included in the amount for which a parcel of land was sold was improperly included, and rendered the sale void.
3. Where, in the absence of any statutory authority, lands were sold for five per cent. in excess of the amount of taxes and charges for which they were liable, such excess is illegal, and the sale void.
4. Sec. 3087, Stats. 1898, provides, where a plaintiff in ejectment is entitled to recover because of a defect in a tax title under which defendant claims, he shall be required, as a condition to judgment, to pay the amount for which the land was sold and costs of sale. Sec. 3088 provides that a judgment in ejectment shall be conclusive as to title upon the party against whom it is rendered and all claiming under him. In ejectment against the holder of a tax title plaintiff was held entitled to

recover by reason of defects in the tax proceedings. *Held*, that the fact that the tax proceedings were illegal did not relieve the plaintiff from paying the amounts imposed by the statute as a condition of his recovery.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action of ejectment, commenced November 9, 1901, to recover 760 acres of land described. The complaint is in the statutory form. The defendant answered by way of admissions, denials, counter allegations, and a counterclaim. At the close of the trial the court found, in effect:

(1) That the plaintiff claims title through mesne conveyances under patents from the United States, and has all the former title to all of the lands, and all the interest and title therein, unless he has been devested by one or more of the five tax deeds under which defendant claims title.

(2) The first tax was issued to Price county March 29, 1899, for the taxes of 1894 on the sale of 1895, and recorded March 29, 1899. The second tax deed was issued to Price county June 22, 1899, for the tax of 1895 on the sale of 1896, and recorded June 23, 1899. October 17, 1899, Price county sold and conveyed by quitclaim deed the lands covered by such tax deeds to the defendant, and the same was recorded on that day, in pursuance of an agreement hereinafter mentioned. The third tax deed was issued to the defendant November 14, 1900, for the tax of 1896 on the sale of 1897, to Price county, and the tax certificates therefor were sold and assigned by the county to the defendant; and the third tax deed was issued thereon to the defendant and recorded November 14, 1900. The fourth tax deed was issued to the defendant June 8, 1901, for the tax of 1897 on the sale of 1898, to Price county, and the tax certificates therefor were sold and assigned by the county to the defendant; and the fourth tax deed was issued thereon to the defendant and recorded June 8, 1901. The fifth tax deed was issued to the

defendant May 17, 1902, for the tax of 1898 on the sale of 1899, to Price county, and the tax certificates therefor were sold and assigned by the county to the defendant; and the fifth tax deed was issued thereon to the defendant and recorded May 17, 1902.

(3) The plaintiff has established, by proof, the following defects in the proceedings antecedent to the issuing and recording of said tax deed: (a) None of the delinquent tax rolls returned for the years 1894 (sale 1895), 1895 (sale 1896), 1896 (sale 1897), 1897 (sale 1898), and 1898 (sale 1899) were signed by the treasurer. (b) The affidavits of the treasurers to the respective delinquent tax rolls (except for 1895) were not in the form prescribed by sec. 1113, Stats. 1898. The column of the year for which the taxes were due was left blank, and the rolls were not filed in the office of the county clerk until June 15, 1899. (c) The statements required to be made by the county treasurer on the first Monday of April in each year—as more fully prescribed in sec. 1130, Stats. 1898—were not made on that day, and were not filed in the office of the county clerk, for the sales of 1895, 1896, and 1897; and such statements for the sales of 1898 and 1899 were not so filed until November 27, 1901. (d) No proofs of publication of notice of sale for 1895, 1896, 1897, 1898, and 1899 were made and filed as required by sec. 1130, *supra;* that certain affidavits were filed which failed to show that the "statement," as well as the "notice," was published, and also failed to show that the publications were had "once in each week" for four successive weeks, and failed to show that the Phillips Bee, in which said pretended notice purported to have been published, was a newspaper that had been regularly and continuously published in that county once in each calendar week for at least two years immediately before the date of such notice, and that no such publications were had. (e) None of the tax rolls, delinquent returns, and stub books, on which the sales of 1895, 1896, 1897, 1898, and

1899 were based, were filed in the office of the county clerk until June 15, 1899. (f) The county treasurer's statement of sale for said five years' sales stated that the annexed statement of lands contained descriptions of lands sold, names of persons to whom sold, amounts for which the same were sold, and the names of owners as far as known; whereas, in fact, said statement only contained one column of names, without any heading, so that it was uncertain whether said column was intended for the names of persons to whom sold or for the names of owners of said lands. (g) The list and notices of expiration of the time to redeem were not made and published as required by sec. 1170, Stats. 1898. The affidavit of such publication fails to state that the list, as well as the notice, was published, and also fails to state that the same was published once a week for twelve successive weeks, and fails to show that the "Bee," in which the publication purported to have been made, had been regularly and continuously published once in each calendar week for the last two years immediately before the date of such notice. (h) All of the defects were found in all the sales on which the said five tax deeds under which the defendant claims title were based.

(4) It appears from the findings of the court, or is undisputed, that May 23, 1899, a proposition was made by James L. Gates to Price county to purchase all lands of which it held tax deeds and pay therefor in cash at the rate of $10 per forty acres, or twenty-five cents per acre, and also all tax certificates in the treasurer's office for the sales of 1897, 1898, and 1899, and pay therefor seventy-five cents on the $1 for all legal tax certificates. May 24, 1899, the county board passed a resolution accepting such proposition, provided that the lands should be paid for within three days after the deeds should be tendered, and all assignments of certificates be paid for within three days after tender of the same. "All conveyances and assignments to be made to *J. L. Gates Land Company.*" Stipulations were made from time to time as to

when payments were to be made and security given, and deeds and assignments delivered. October 16, 1899, the county treasurer had computed the amount of tax certificates so agreed to be purchased at seventy-five per cent. of their face value at $11,003.85, and for the lands covered by the first and second tax deeds mentioned, at twenty-five cents per acre, at $20,829.95—making in all, $31,833.80; and pursuant to such agreement the county executed and delivered to the defendant the quitclaim deed of October 17, 1899, above mentioned. The lands involved in this action are a part and parcel of the lands described in such quitclaim deed; and the third, fourth, and fifth tax deeds mentioned were issued to the defendant upon tax certificates so purchased by the defendant from the county. The allegations of the reply to the counterclaim in respect to the illegality of such purchase by the defendant from the county of the lands in question are true; and, among other things, such purchase was void, because (1) the sale was executory; (2) because a part of the consideration was that the defendant would pay the taxes for 1900, 1901, 1902, and 1903; (3) because a large amount of the lands included in the quitclaim deed were not then held by the county under tax deeds, but only under tax certificates; (4) because the three tax deeds taken by the defendant after October 17, 1899, were so taken at the expense of the county upon certificates held by the defendant, which accordingly had cost the defendant less than seventy-five cents on the dollar.

(5) No notice was given for the sale of such certificates less than for face value, as required by sec. 664, Stats. 1898.

(6) The notice was not given in accordance with the resolution, nor with sec. 664, Stats. 1898.

(7) The county held 4,000 or 5,000 acres of tax lands and a large amount of tax certificates so agreed to be purchased, but not included in the quitclaim deed, nor paid for by the defendant.

(8) None of the certificates so purchased by the defendant were ever indorsed on the back by the county treasurer, but only by the county clerk, contrary to the resolution of the board.

(9) The resolution of the board of October 16, 1899, accepting the balance tendered by the defendant as of October 2, 1899, was made on the express consideration that the defendant waived payment to him of the redemption moneys paid on such certificates between May 23, 1899, and July 6, 1899.

(10) During such negotiations and sale the county clerk was the authorized and acting agent of the defendant in disposing of such lands and certificates for a sum largely in excess of the amount paid, and the moneys received by the clerk on such sales were applied as so much paid to the county by the defendant, and the county clerk received ten per cent. commissions for the moneys received by him on such sales.

(11) The defendant paid the taxes on said lands for 1900 and 1901, and interest to July 9, 1902, and costs and fees, amounting to $162, but never paid the county the amount for which the lands were sold for those years, respectively.

And as conclusions of law the court found that the plaintiff is the owner of and has an estate in fee simple in and to all the lands described, and is entitled to the immediate possession thereof, and that the defendant unlawfully withholds possession of the same from the plaintiff, to his damage in the sum of six cents; that the defendant has no interest in the lands, except as stated; that each of the five tax deeds are null and void for irregularities not going to the groundwork of the tax; that the defendant holds no right, title, or interest in or to the lands under said tax deeds; that the sale of the lands and tax certificates from Price county to the defendant, covering the lands in question, is null and void, and the defendant has no right, title, or interest of any kind or nature in or to said lands under the same, nor to the tax certificates on

which such five tax deeds were issued; that the defendant should take nothing under its counterclaim, and the plaintiff should recover in this action.

Thereupon the court ordered that the taxes paid upon the lands by the defendant for the years 1900 and 1901, with interest thereon at fifteen per cent. per annum from the time they were so paid to the date of the findings, be set off against the damages awarded to the plaintiff, and that the plaintiff, as a condition of the judgment, shall pay any excess over such damages, with interest from the date of the findings, within ninety days, and that in default thereof the defendant shall have judgment in this action in compliance with such order, and in accordance with the findings of fact and the conclusions of law.

Thereupon, and after the making and filing of such findings of fact and conclusions of law, and the entry of such order, October 29, 1902, and on November 19, 1902, the plaintiff notified the defendant in writing to the effect that he thereby offered to pay to the defendant, on its request, the amount for which the lands in question were sold for the taxes for the years 1895, 1896, 1897, 1898, and 1899, and the costs of executing and recording the tax deeds taken on such sales, with interest on all such sums at the rate of fifteen per cent. from the date of sale until the date of the findings herein, together with full legal interest up to the date of such acceptance—such payment, however, to be made only on condition that the defendant would not appeal to the supreme court from the judgment to be entered therein; the offer being made for the purpose of avoiding the costs and expenses of an appeal, and for that purpose the plaintiff thereby waived the question as to the amount to be thus allowed to the defendant. November 26, 1902, the defendant declined to accept such offer. Thereupon, and on December 6, 1902, judgment was entered reciting that the plaintiff had complied with such order and paid such excess into court,

and which judgment was in all respects in accordance with such findings and order, and that the plaintiff recover from the defendant the six cents damages found, and $178.66 costs and disbursements as taxed. From that judgment the defendant brings this appeal.

For the appellant there was a brief by *T. C. Ryan* and *T. H. Ryan,* attorneys, and *L. M. Sturdevant,* of counsel, and oral argument by *Mr. Rublee A. Cole* and *Mr. Sturdevant.*

For the respondent there was a brief by *H. C. Peters* and *K. K. Kennan,* attorneys, and *Barry & Barry,* of counsel, and oral argument by *Mr. Kennan* and *Mr. M. Barry.*

CASSODAY, C. J. The court found, and it is conceded by the defendant, that the plaintiff is the owner of all the lands in question, and is entitled to the possession thereof, unless he has been divested by one or more of the five tax deeds under which the defendant claims title. Of course, a tax deed in regular form is "presumptive evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to and including the execution of the deed." Sec. 1176, Stats. 1898. Nevertheless, until the statute of limitation has run in favor of such deed, such presumption may be overcome by proof of defects which will invalidate the tax deed. The plaintiff contends that there are numerous defects, disclosed in the record, any one of which should have such an effect. Several of these questions are important, and should only be determined by this court after very careful consideration. The view we have taken of this case only requires that we should here determine two of these questions; and they are, in effect, covered by the recent decision of this court in *Chippewa River L. Co. v. J. L. Gates L. Co., ante,* p. 345, 94 N. W. 37, 95 N. W. 954, as modified by the opinion filed on the motion for a reargument in the case.

It is claimed on the part of the plaintiff that, at each of the tax sales under which the five tax deeds in question were respectively taken, the lands were sold for a sum considerably in excess of the unpaid "taxes, interest and charges thereon," as prescribed by the statute. Sec. 1130, Stats. 1898. The tax certificates upon which such tax deeds were issued are all in the record. The evidence shows the several amounts of taxes returned by the town treasurer as delinquent on the lands therein described for each of the five years in question, and also the amounts for which such lands were sold. From such evidence it appears, in effect, and is undisputed, that each of such sales was for an amount equal to the aggregate amount of the delinquent return, with the interest allowable thereon to the day of sale, and twenty-five cents "fee for advertising" and twenty-five cents for the certificate of sale, and for an additional amount equal to five per cent. of the amount of the return. To illustrate: A certificate on the sale of May 21, 1895, is for $3.42, whereas the delinquent return is only $2.66—making a difference of seventy-six cents; and that includes the two items of twenty-five cents each mentioned, and the interest on the return to the day of sale, and the five per cent. on the amount of the return, additional. The certificate on the sale of May 19, 1896, is for $3.57, whereas the delinquent return is only $2.80. So the certificate on the sale of May 18, 1897, is for $3.29, and the delinquent return only $2.54. The certificate on the sale of May 17, 1898, is for $3.66, and the delinquent return only $2.88. The certificate on the sale of May 16, 1899, is for $3.99, and the delinquent return only $3.18.

So far as the allowance of twenty-five cents for the certificate is concerned, that is determined in favor of the defendant in the *Chippewa River Land Co. Case, supra.* On the other hand, it was there determined, upon facts quite

similar to the facts in the case at bar, that the twenty-five cents, "fee for advertising," was improperly included. In that case, as in this, there were five publications of each notice of sale; but the last publication in each case was less than a week prior to the sale, and hence could not be regarded as a legal publication within the meaning of the statute. Sec. 1130, Stats. 1898. Here the fifth publication was in no instance more than five days prior to the sale. Rejecting the fifth publication, therefore, as "mere surplusage," and regarding the fourth publication as the last publication, as held in the *Chippewa River Land Co. Case,* and the question recurs whether the "fee for advertising" was included in the amount for which the lands were sold, contrary to the statute. Sec. 1132, Stats. 1898. That statute provides:

"Every printer who shall publish such statement and notice shall, immediately after the last publication thereof, transmit to the treasurer of the proper county an affidavit of such publication made by some person to whom the fact of publication shall be known; and no printer shall be paid for publishing any such statement and notice who shall fail so to transmit such affidavit within six days after the last publication thereof."

Here it appears, and is undisputed, that "such statement and notice," and the affidavit of the publication thereof, were not transmitted to the treasurer of the county "within six days after the last publication thereof," within the meaning of that section. As stated in the case cited, the words "last publication" must "be taken in their natural and ordinary sense, as referring to the last issue of the paper in which the statement and notice were legally published, and not the completed period of publication." As there indicated, the purpose of the strict requirement of the statute quoted is undoubtedly to make it sure that the proof of proper publication shall be in the hands of the treasurer

before the sale takes place. The publication must be for four successive weeks prior to the day of sale prescribed in the statute. Sec. 1130, Stats. 1898. As stated by my Brother WINSLOW in the case cited:

"The full period of twenty-eight days from the date of the first publication must expire before the day of sale, and that period may expire on the day before the sale, but generally expires less than six days preceding the day of sale. Thus, if the affidavit were not required to be transmitted until six days after the completed period of twenty-eight days, it would frequently fail to be in the hands of the treasurer before the sale, and the treasurer could not transmit it to the clerk, with the statement of the sale and the other papers, immediately after the sale, as he is required to do by sec. 1141."

For the reason stated, we must hold that the printer's fee of twenty-five cents was improperly included in the amount for which each sale was made. See *Ward v. Walters,* 63 Wis. 39, 44, 22 N. W. 844; *Pittelkow v. Milwaukee,* 94 Wis. 655, 69 N. W. 803.

In addition to the unpaid taxes returned, with interest thereon to the day of sale, the printer's fee of twenty-five cents, and the certificate fee of twenty-five cents, there was included in each sale an additional amount, equal to five per cent. of the amount of the delinquent return. No attempt is made to justify the inclusion of such additional amount. It was held by this court at an early day that, "where lands were sold at a tax sale for *an illegal excess* of five per cent. above the amount of taxes and charges for which they were liable to be sold, the sale was *void.*" *Kimball v. Ballard,* 19 Wis. 601; *Warner v. Outagamie Co.* 19 Wis. 611; *Pierce v. Schutt,* 20 Wis. 423. Thus it appears that the tax sale of 1895, upon which the tax certificate of that year mentioned was issued, was for an illegal excess of thirty-eight cents. Each and all of the other tax sales were for a corresponding illegal excess. It follows that each of

the five tax deeds based upon such sales, respectively, is void.

2. But it is contended on the part of the defendant that, notwithstanding the fact that such deeds are all void, still the judgment should be reversed, because it fails to conform to the statute. Sec. 3087, Stats. 1898. There is no pretense that any of the lands claimed by the plaintiff "were not liable to taxation for the tax for which they were sold, or that such tax was paid prior to the sale, or the land was redeemed from such sale;" and hence the case comes squarely within the provisions of that section, which declares:

"The court shall order that the amount for which such land was sold, and the costs of executing and recording such tax deed, and the amount paid by the defendant for taxes assessed upon such premises subsequent to said sale, with interest on all such sums at the rate of fifteen per centum per annum from the time so paid until the date of the verdict, shall be set off against the damages awarded to the plaintiff by the verdict; and if there be any excess, that the plaintiff, as a condition of judgment, shall pay the same, with interest from the date of the verdict, within ninety days; and that, in default thereof, the defendant shall have judgment in the action."

On the part of the plaintiff it seems to be claimed that he is entitled to recover the lands, without complying with the conditions thus imposed by the statute, by reason of the alleged illegal sale of lands and tax certificates from the county to the defendant in 1899, set forth in the foregoing statement of facts.

This is an action of ejectment. The statute expressly declares:

"Every judgment rendered in any such action shall be conclusive as to the title established therein upon the party against whom it is rendered and upon all persons claiming from, through or under him by title accruing after the filing of a notice of the pendency of the action in the office of

the proper register of deeds, subject to the exceptions hereinafter contained." Sec. 3088, Stats. 1898. See, also, sec. 3074, Stats. 1898.

Whatever view may be taken of such sale of lands and tax certificates by the county to the defendant, yet it could not operate to relieve the plaintiff from the payment of what was justly and equitably due for the taxes, interest, and charges on the lands for the several years mentioned. The fact, if it be a fact, that the transaction was illegal, did not relieve the plaintiff from paying the amount imposed by statute as a condition of his recovery in ejectment. His right to recover at all is based upon the illegality of the proceedings upon which the several tax deeds were based. The manifest purpose of the statutes cited is to have the judgment in ejectment conclude all further controversy as to any claim by the defendant or any one claiming under it on account of any such taxes. *Cook v. McComb,* 98 Wis. 526, 530, 74 N. W. 353; *Bell v. Peterson,* 105 Wis. 607, 611, 612, 81 N. W. 279.

The trial court was clearly wrong in limiting the amount to be paid by the plaintiff, as a condition of judgment being entered in behalf of the plaintiff, to the taxes of 1900 and 1901. Counsel for the plaintiff apparently attempted to cure such error by offering to pay the defendant, on its request, the amount of the taxes for the five years mentioned, respectively, and the costs of executing and recording the several tax deeds, with interest on all such sums at the rate of fifteen per cent. from the date of sale, but only on condition that the defendant would not appeal to this court from the judgment to be entered therein. The offer, being conditional, and not being accepted, was, of course, ineffectual. What is said upon this question in the last opinion filed in the *Chippewa River Land Co. Case* cited is applicable here. We must hold that the judgment is erroneous for failure to impose upon the

plaintiff the conditions prescribed in the statutes in the particulars mentioned.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion and as prescribed in the statutes.

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OPITZ, Respondent, vs. KAREL, Administrator, Appellant.

*May 15—July 3, 1903.*

*Life insurance: Parol gift of policy: Validity: Insurable interest: Waiver: Evidence: Judgments: Appeal and error: Executors and administrators: Interest: Costs.*

1. A life insurance policy, payable to the personal representatives of the assured, provided that if assigned the assignment must be in writing; that the company should not be required to notice such assignment until the original or a duplicate thereof be filed in the home office, and that the company assumed no responsibility for its validity. *Held*, that such policy was the subject of a parol gift, *inter vivos*, without notice to the insurer.
2. In such case, the policy contained no agreement declaring the policy void in case of a transfer not in writing, nor any terms imposing restrictions on the insured to deal with third parties concerning it as his property. *Held*, that the provision at most was for the benefit and protection of the company, and did not prevent the insured from transferring the policy as a chose in action.
3. In an action by the alleged donee of a life insurance policy against the personal representative of the insured, who was named in the policy as beneficiary—the company having paid the proceeds of the policy into court,—the evidence considered, and *held* sufficient to show that the insured made a completed parol gift of the policy to the plaintiff, vesting the title to the fund realized therefrom in her.
4. A woman has an insurable interest in the life of the man whom she is under contract to marry.
5. Under a life insurance policy payable to the personal representatives of the insured, providing, among other things, that

if assigned the assignment must be in writing, the insured made a parol gift thereof to the woman whom he was under contract to marry. Action being brought on such policy, the insurance company paid the proceeds of the policy into court, and procured the personal representative of the insured to be made a party. *Held*, that the company thereby waived any objection it might have made to such transfer of the policy by the insured during his life time.

6. In such case, any objections to the transfer of the policy which the company might have made are not available to the personal representative of the insured.

7. In an action by the donee of a life insurance policy against the personal representative of the insured, who was named as the beneficiary in the policy, there was nothing to show that the personal representative was guilty of any misconduct or bad faith in defending the action. *Held*, that it was error to enter a personal judgment against the personal representative for interest and the costs and disbursements of the action.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Modified and affirmed.*

Plaintiff brings this action to recover the proceeds of a life insurance policy issued by the Prudential Life Insurance Company of America on the life of William Enos, payable to his executors, administrators, or assigns. She claims to be owner of this policy as a gift by the insured. The action was instituted against the company. It appeared, paid the amount due thereon into court, subject to its order, and prayed that Oscar Opitz, as administrator of the estate of William Enos, deceased, be substituted as defendant, which prayer was granted. The county court of Milwaukee county removed Oscar Opitz as administrator of said estate, and substituted the appellant, who was thereafter substituted as defendant. It appeared upon the trial that on May 24, 1894, William Enos, then twenty years of age, made application to the Prudential Life Insurance Company of America for insurance upon his life. The company issued him a policy for $1,000, conditioned upon the payment of the stipulated quar-

terly premium, and to be paid upon satisfactory proof of his death. One of the conditions of said policy was:

"If this policy shall be assigned the assignment must be in writing and the company shall not be required to notice such assignment until the original or a duplicate thereof is filed in the home office. The company will not assume any responsibility for the validity of any assignment."

William Enos died September 28, 1900. At the time the policy was delivered to him by the company, on June 1, 1894, plaintiff and the insured were engaged to be married. This promise and engagement of marriage continued until his death. On the day the policy was received by him, he delivered it to the plaintiff, making her a parol gift thereof. She accepted the policy, and held it up to the time of his death. The court found that the deceased ratified the gift after he became of age, that he gave her the money to pay the quarterly premiums, and that she applied the same upon the policy. Upon this state of facts, the court awarded plaintiff judgment for the amount due on the policy, and for interest from the date the company paid the same into court to the date of the judgment, and for costs and disbursements incurred upon the trial.

For the appellant there was a brief by *Cummings, Hayes & Thiel,* and oral argument by *W. F. Thiel.*

*James H. Stover,* for the respondent.

SIEBECKER, J. The facts in this case present the question, Could the proceeds of this policy be made the subject of a gift, as claimed by the plaintiff? To consummate a gift *inter vivos,* there must be an absolute delivery of the subject of the gift by the donor, with an intention to part with his interest in and dominion over the property sought to be transferred. The rule seems well settled that bonds and other negotiable instruments for the payment of money can be transferred by delivery to the intended donee as a gift with-

out a written assignment. The essential requirement in cases of gifts is that such a delivery shall be made as the nature of the subject sought to be bestowed reasonably admits of. Many of the strict requirements to the transfer of property by gift, indicated by the earlier cases, have been removed or relaxed to give a freer exercise to such a disposition of property. This modification of the law applies to what may be the subject of a gift, as well as the manner of executing it. In the case of *Crook v. First Nat. Bank,* 83 Wis. 31, 52 N. W. 1131, the court adopts the language of SHAW, C. J., in *Chase v. Redding,* 13 Gray, 418,—expressing the rule on the subject of gifts, as follows:

"Originally it was limited, with some exactness, to chattels—to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer or to order, and indorsed in blank. Subsequently it has been extended to bonds and other choses in action in writing, represented by a certificate, when the entire equitable interest is assigned."

The court further states:

"These cases all go on the assumption that a bond or other security is a valid, subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money by a gift and delivery of the instrument that shows its existence, and affords the means of reducing it to possession." *Basket v. Hassell,* 107 U. S. 602, 2 Sup. Ct. 415; *Reed v. Copeland,* 50 Conn. 472; *Schollmier v. Schoendelen,* 78 Iowa, 426, 43 N. W. 282.

In some jurisdictions, it has been held that certificates of stock in a corporation can be the subject of a valid gift by delivery thereof, though the rules of the corporation prescribing the manner of executing an assignment have not been complied with. The basis of these decisions is that the law recognizes the binding effect of such transfers, as between the parties thereto, though it does not alter the relations which exist between the shareholder and the persons related to him by

reason of being members of the same company. *Commonwealth v. Compton,* 137 Pa. St. 138, 20 Atl. 417; *Reed v. Copeland, supra.* The suggestion that such an agreement cannot be relied upon, because it rests entirely in parol, is in conflict with the established rules controlling a transfer of property of this nature, where the delivery of the instrument which is the evidence of a subsisting obligation is a symbolical delivery of the property, and operates as a completed transfer of the title as between the parties to the transaction. No particular form or words or written instrument is required by the law to constitute an assignment of this class of property.

"Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as effectual as the most formal instrument. . . . The same is true as to gifts of choses in action, if a delivery, or what in judgment of law amounts to such, takes place." *Crook v. First Nat. Bank, supra; Wilson v. Carpenter,* 17 Wis. 516; *Skobis v. Ferge,* 102 Wis. 122, 78 N. W. 426.

The delivery of the instrument is a symbolical delivery of the fund, and the contract or gift becomes executed and completed, vesting title in the person receiving it.

It is strenuously contended that the rule is firmly established in this state, permitting no transfer of a policy in cases like this, except it be with the consent of the insurance company, and in the manner prescribed by the contract. Some of the recent cases relied upon in support of this proposition refer to change of beneficiaries. In *McGowan v. Supreme Court I. O. F.* 104 Wis. 173, 80 N. W. 603, the subject of changing beneficiaries by the certificate holder in a mutual benefit association was fully considered. It is there held that, if the holder of such certificate "wishes to change the beneficiary, he must make the change in the manner required by his policy, and the rules of the association, and that any material deviation from this course will render the attempted

change ineffectual. It is equally well settled that there are cases where literal and exact conformity with the requirements of the policy may be excused." The exceptions are considered and stated in the opinion upon a full review of the case of *Supreme Conclave R. A. v. Cappella,* 41 Fed. 1, and other cases. In the latter case of *Berg v. Damkoehler,* 112 Wis. 587, 88 N. W. 606, the question of changing beneficiaries by the insured in an ordinary life policy was considered, and the court states:

"The general rule is that the change in beneficiary must be made in the manner required by the policy. This rule, however, in this state, is subject to several exceptions, one of which is that the insured may dispose of the policy by will to the exclusion of the beneficiary, when he first paid the premiums and kept control of the policy." Citing *Breitung's Estate,* 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; *Clark v. Durand,* 12 Wis. 223; *Kerman v. Howard,* 23 Wis. 108; *Strike v. Wis. O. F. M. L. Ins. Co.* 95 Wis. 583, 70 N. W. 819; *Alvord v. Luckenbach,* 106 Wis. 537, 82 N. W. 535.

The right to select a beneficiary, secured either by the contract, or under some provision of the charter or by-laws of the insurer, is in the nature of a power, and must therefore be exercised in compliance with the terms of the contract granting the power, while the right of a holder to transfer a policy on his own life, and in his possession and control, if not prohibited by its terms, has been upheld as a legal right attached to the contract. This distinction between the right to transfer a policy and to change beneficiaries has at times not been carefully observed in the construction of such contracts. The cases of *McGowan v. Supreme Court I. O. F.* and *Berg v. Damkoehler* present questions of a change of beneficiaries, and the principle applied as ruling those and like cases is in no way limited, modified, or affected by this right to transfer. The facts involved in those cases were in legal effect so unlike those involved in this case that the opinion in neither of those cases can properly be regarded as con-

trolling this case, nor in conflict with the conclusion we have reached. The recent case of *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378, is a pertinent authority on this question. This court in that case states:

"In Wisconsin, however, there has existed from early times a principle of the law of life insurance which is unique and at variance with the law in most of the states. This principle is that a person who insures his own life for the benefit of another, and pays the premiums thereon, may (except as limited by statute as to married women) dispose of the policy by will, or in other manner not inconsistent with the terms of the policy, to the exclusion of the beneficiary named therein."

Though the beneficiary in such a policy has a vested interest, he can do nothing to prevent the insured, as equitable owner, from revoking such beneficial interest, retain it himself, or vest it elsewhere, when not prevented by the terms of the contract.

Appellant contends that under the contract in question the insured was prohibited from transferring this policy by will or otherwise, except by assignment in writing, and filing the original or a duplicate thereof in the home office of the company. The stipulation is:

"If this policy shall be assigned the assignment must be in writing and the company shall not be required to notice the assignment until the original or a duplicate thereof is filed in the home office. The company will not assume any responsibility for the validity of any assignment."

This condition contains no agreement declaring the policy void in case of a transfer not in writing, nor any terms imposing restrictions on the insured to deal with third parties concerning it as his property. The provision, at most, is for the benefit and protection of the company, which it may assert as against any claimant of the proceeds of the policy, other than the beneficiary named therein. It does not, however, prevent the insured from transferring it as a chose in action. We are unable to find anything in the contract or the condi-

tion attached which takes from the insured the right and power to dispose of the policy by any of the methods approved in the law, to the exclusion of the beneficiaries named in the policy. Such a policy is not to be distinguished from ordinary choses in action, and comes within the operation of the legal rules applicable to agreements involving pecuniary obligations. To deprive the policy owner of the right given him by the law to dispose of it, we must find clear and binding provisions to that effect. In addition to cases cited from this court, others supporting this doctrine are *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Ireland v. Ireland*, 42 Hun, 212; *Olmsted v. Keyes*, 85 N. Y. 593; *Marcus v. St. Louis M. L. Ins. Co.* 68 N. Y. 625; Bacon, Ben. Soc. § 298, and cases cited.

The case, then, presents this situation: The deceased procured a policy on his own life for the benefit of his executors, administrators, or assigns; agreeing to pay the premiums; retaining possession and control of it up to the time of the alleged gift to the plaintiff. Under the law of this state, he had the right and power to transfer it in any of the ways provided by the law. It is difficult to perceive why his interest in the policy could not, in law, be held as properly subject to gift as notes, bonds, and certificates. It represents a subsisting obligation while in force, as do these written instruments. It is the evidence of an amount to be paid at a time fixed by the contract, though it may lapse by failure to comply with its terms. This contingency, however, cannot destroy its character as a transferable chose in action while it subsists as a valid obligation. The doctrine is supported by reason and authority. It has been held that the insured, having the power to transfer the policy under the law and the terms of the contract, may dispose of it by gift, and, when such transfer meets the requirements of the law constituting a gift, the title to the fund at its maturity is vested in the donee. *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33

Atl. 1060; *Hogue v. Minn. P. & P. Co.* 59 Minn. 39, 60 N. W. 812; *Ireland v. Ireland, supra; Chapman v. McIlwrath,* 77 Mo. 38; *Marcus v. St. Louis M. L. Ins. Co. supra; Appeal of Madeira,* (Pa.) 4 Atl. 908; *Crittenden v. Phœnix Mut. L. Ins. Co.* 41 Mich. 442, 2 N. W. 657; *Williams v. Guile,* 117 N. Y. 343, 22 N. E. 1071; Thornton, Gifts & Adv. 150, note 1.

The contention that it is not established in the case that the insured made a complete delivery of the policy, and surrendered dominion over it, is not borne out by the facts. It appears he gave plaintiff this policy on the day he received it from the company. She retained possession of it, except that deceased procured it shortly before his death, to have it assigned to her in writing. At the suggestion of the company's local agent, he postponed such assignment, with intention to do this after his marriage to plaintiff, which was then expected to take place in the near future. On the same day he returned the policy to the plaintiff, who retained and held it up to the time of his death. These facts, coupled with the other circumstances of the case, can leave no doubt that he completely surrendered his dominion over the policy at the time he first delivered it to the plaintiff. We must hold that deceased had the legal right to, and did, make a gift of the policy to the plaintiff, vesting title to the fund in her, and therefore the contingency which would give the personal representatives of the donor any interest in the fund did not arise. When the gift was perfected and consummated, donee's rights and interests became absolute, and all possibility of a devolution of benefits of the policy upon the personal representatives of the insured ceased.

It was argued that nothing appeared, showing that an insurable interest existed between the insured and plaintiff, and therefore all intendments should be presumed against the gift. The following cases sustain the position that an insurable interest exists where one party "has a reasonable right to

expect some pecuniary advantage from the continuance of the life of the other, or to fear a loss from his death, . . . as in case of a man and woman between whom a contract of marriage exists." *Chisholm v. National C. L. Ins. Co.* 52 Mo. 203; *Taylor v. Travelers' Ins. Co.* 15 Tex. Civ. App. 254, 39 S. W. 185; *Same Cases,* 53 L. R. A. 825, note.

The company has paid the proceeds of the policy into the court for the lawful owner. By this act it has waived any objection it might have made to any transfer of the policy by the insured during his lifetime. Any objections to a transfer of this policy which this company might have made under this condition are not available to the defendant, as the personal representative of the deceased, nor any other person interested in his estate. The gift of the policy to the plaintiff made her the owner of the proceeds. We must hold that the judgment properly awarded her the amount due on the policy.

The court awarded judgment for interest on the fund for the time the fund was in court, and for costs and disbursements incurred by the plaintiff in the action against the defendant personally. Nothing appears in the record to show that he was guilty of any misconduct or bad faith in defending this action. Under such circumstances, the judgment should have directed such interest and costs and disbursements to be paid out of the estate. *Ladd v. Anderson,* 58 Wis. 591, 17 N. W. 320; *Wiesmann v. Brighton,* 83 Wis. 550, 53 N. W. 911. The judgment of the circuit court is erroneous in this respect.

*By the Court.*—The judgment of the circuit court is modified so as to render judgment for the interest and the costs and disbursements against appellant as administrator of the estate of William Enos, deceased; and, as so modified, the judgment is affirmed. The appellant is awarded costs on this appeal.

KINN and another, Appellants, vs. FIRST NATIONAL BANK OF MINERAL POINT and others, Respondents.

*May 29—July 3, 1903.*

*Rewards: "Arrest and conviction": Rights of claimants: Police officers: Rights to recover reward: Costs: Findings: Appeal and error.*

1. A reward is a recompense or premium offered by the government or an individual in return for special or extraordinary services to be performed, and may be made in writing or orally, either to a particular person or class of persons, or to any and all persons complying with its terms.
2. An offer of a reward for the "arrest and conviction" of an unknown perpetrator of a crime cannot be taken literally, but the conditions thereof are substantially performed by a person who obtains possession of the facts necessary to secure the arrest and conviction, *and gives them* to some proper person interested, although he does not himself make the arrest, but this and the prosecution are made by the proper officers.
3. Police and other officers may recover a reward offered when the information furnished or the service performed was *extra official*, but cannot recover the reward offered if the information furnished or the service performed was within the scope of the duties of such officer.
4. A reward for the arrest and conviction of the person who committed a bank robbery having been offered, O., a chief of police, on information furnished by his co-plaintiff, made an arrest, without warrant, within the city limits. Thereupon defendant T., as deputy sheriff, took the prisoner in charge upon a warrant for his arrest, and, after several days' confinement, followed by a confession and plea of guilty, the prisoner was convicted and sentenced. Ch. 272, Laws of 1901, prescribes the duties of such chief of police as follows: "He shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables, and be taken as included in all writs and papers addressed to constables. It shall be his duty . . . to arrest, with or without process . . . every person found in the city in a *state of intoxication* or engaged in any *disturbance of the peace*, or *violating any law* of the state or ordinance of such city." *Held*, that such statute imposed no duty on the chief of police to make such arrest without process,

and the mere fact that O. was at the time such officer did not preclude him from the reward or any portion thereof.

5. Under sec. 2789, Stats. 1898 (providing that the defendant in any action may serve on plaintiff an offer of judgment "with costs," and plaintiff, if he refuse, must pay defendant's costs "from the time of the offer"), where a bank had offered a reward for the arrest and conviction of the person who robbed it, and, on being sued by one claimant, paid the amount of the reward into court and procured the other claimants to be interpleaded, the whole of such reward so deposited in court must be deemed to be the property of the claimants who may ultimately recover, and it is error to adjudge costs in favor of the bank, payable out of the fund in court.

6. Under sec. 2863, Stats. 1898 (providing that in trials of questions of fact by the court the judge shall state separately in his decision the facts found by him and his conclusions of law thereon), there is nothing to support a judgment, where the judge makes no findings of fact on issues presented, and the evidence fails to disclose with reasonable certainty the rights of the respective parties.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

It appears and is undisputed that on the night of May 24, 1901, the *First National Bank of Mineral Point* was burglarized, and about $25,000 stolen therefrom; that May 25, 1901, the bank publicly and orally offered a reward of $1,000 for the "arrest and conviction" of the culprit, or, as admitted by the bank, "for the arrest and securing the conviction of the person who committed the burglary;" that about that time suspicion fell upon one Stewart Jelleff, *alias* H. C. Winter, who had disappeared; that May 27 or 28, 1901, Jelleff was arrested and taken into custody and lodged in jail, and thereupon made confession, and on July 10, 1901, pleaded guilty in the circuit court, and on that day was convicted and adjudged guilty of the crime, and sentenced to the State Reformatory at Green Bay. July 15, 1901, the plaintiffs commenced this action against the bank, and in their complaint alleged, in effect, that in pursuance of the offer they made search for Jelleff, and found him, and made the

arrest without warrant or process, and that they had performed all the conditions of the offer and claimed the reward. The bank answered, admitting the burglary, the suspicion of Jelleff, and his disappearance, and that it had "offered publicly a reward of one thousand dollars for the arrest and securing the conviction of the person who had committed said burglary"; that the plaintiff *Ovitz* had taken Jelleff into custody without warrant or process; that Jelleff pleaded guilty, and was sentenced to a term in the State Reformatory at Green Bay; and the answer alleges, in effect, that the plaintiffs claim such reward; that *William B. Dawe, Charles H. Terrell,* Mark A. Shepley, and *Alfred Richards,* without any collusion between either of them and the bank, each made the same claim, and each demanded and claimed the $1,000; that they, or some of them, did acts and gave information in connection with the arrest and securing the conviction of Jelleff which might entitle them to the reward, or some portion thereof; that the bank was unable to determine the rights of the respective persons claiming the reward, and thereby offered to pay the $1,000 into court, to be paid to whomsoever should be found entitled thereto; and that a complete determination of the controversy could not be had without the presence of each of the persons named as parties, and prayed for an order making them parties accordingly. Such order was made September 30, 1901, reciting that the bank had deposited $1,000 in court, and therein required that the summons and complaint be amended accordingly, and served on each of the persons named. Shepley disclaimed any right to the reward in open court, and requested that he should not be made a party, and he was not. The defendants *Dawe, Terrell,* and *Richards* each answered separately. *Dawe* demanded the reward by reason of having found some evidence which he claims would have been important had the burglar pleaded not guilty and stood trial, and which he claims had an influence in causing the burglar to plead guilty. *Terrell*

demanded the reward by reason of having secured evidence which he claims would have been important had the burglar pleaded not guilty. *Richards* demanded the reward by reason of having given to the plaintiff *Ovitz* information which he claims led to the arrest of the burglar. At the close of the trial the court made findings, which, in addition to the admitted facts mentioned, consist mostly in a recitation of evidence in detail. Among other things, it is, in effect, found, as a matter of fact: (5) That many persons made search for evidence regarding the burglary, and for the money that had been stolen, and pieces of evidence having some tendency to show that Jelleff was the burglar were discovered by persons making no claim to the reward. (6–11) That during the evening of May 27, 1901, the defendant *Richards* drove out through Cocking's Grove—just beyond the city limits—and there discovered Jelleff, and returned to the city, and informed the plaintiff *Ovitz,* the city marshal, who, with the plaintiff *Kinn,* drove out, and found Jelleff, and arrested him, without warrant or process, and lodged him in jail. (12) The findings then state in detail the numerous facts upon which the defendant *Dawe* claims the reward, and (13) the same with respect to the defendant *Terrell.* (14) The court then finds, in effect, that Jelleff was arrested by *Ovitz* without a warrant, within the city limits, May 28, 1901; that *Terrell,* as deputy sheriff, then took him in charge upon a warrant for his arrest, and kept him for a number of days in a cell in the city hall, and for his services as deputy sheriff he filed a claim against the county, which was allowed and paid. (15) That Jelleff finally confessed, pleaded guilty, and was convicted and sentenced as stated. (16) That the other allegations of the complaint are not sustained by the evidence. (17) That all the issues of fact raised by the pleadings in this action are hereby found and decided in favor of the defendants *Richards* and *Dawe* and against all the

other parties to this action. As conclusions of law the court found, in effect: (1) That the plaintiffs *Kinn* and *Ovitz* and the defendant *Terrell* made claim to the reward in good faith, and upon probable grounds, and the costs in this action should not be imposed upon them; (2) that the taxable costs of the defendant bank, and also the taxable costs of the defendants *Richards* and *Dawe,* should be paid out of the fund in court; (3) that the remainder of said fund should be divided equally between the defendants *Richards* and *Dawe;* and the court ordered judgment to be entered accordingly. From the judgment so entered, the plaintiffs bring this appeal.

For the appellants there was a brief by *Fiedler & Fiedler,* and oral argument by *E. C. Fiedler.* They contended, *inter alia,* that the court erred in holding the reward may be apportioned. Unless a party claiming the reward participates in making the arrest, he cannot recover, regardless of what he may have done to bring about a conviction. *Williams v. West Chicago St. R. Co.* 191 Ill. 610; *Hogan v. Stophlet,* 179 Ill. 150, 44 L. R. A. 810; *Furman v. Parke,* 21 N. J. Law, 310; *Fitch v. Snedaker,* 38 N. Y. 248; *Juniata Co. v. McDonald,* 122 Pa. St. 115; *Pool v. Boston,* 5 Cush. 219; *Jones v. Phœnix Bank,* 8 N. Y. 228; *Blain v. Pacific Exp. Co.* 69 Tex. 74; *Shuey v. U. S.* 92 U. S. 73.

For the respondents there was a brief by *Smelker & Smelker* for respondent *Dawe,* and a separate brief by *J. M. Smith,* attorney, and *Herbert Kinne,* of counsel, for respondent *Richards,* and oral argument by *Mr. Kinne.* They contended, *inter alia,* that the part taken by *Ovitz* in the premises was simply in discharge of his official duties for which he was paid, and on the grounds of public policy he could not claim the reward offered. *Austin v. Milwaukee Co.* 24 Wis. 278; *Ring v. Delvin,* 68 Wis. 384; *Lees v. Colgan,* 120 Cal. 262, 40 L. R. A. 355; *Hogan v. Stophlet,* 179 Ill. 150, 44 L. R. A. 809, 811, 812; *Witty v. Southern Pac. Co.* 76 Fed.

217; Cooley, Torts, 175; *Keenan v. State,* 8 Wis. 132, 136; *Mitchell v. Vance,* 5 T. B. Monroe, 528, *Gillmore v. Lewis,* 12 Ohio, 281.

CASSODAY, C. J. To appreciate the questions presented, it is important to keep in mind the nature of the action. It is said: "A reward is a recompense or a premium offered by the government or an individual in return for special or extraordinary services to be performed." 21 Am. & Eng. Ency. of Law, 389. Such offer may be made in writing or orally, either to a particular person or class of persons, or to any and all persons complying with its terms. 21 Am. & Eng. Ency. of Law, 391; *Reif v. Paige,* 55 Wis. 496, 13 N. W. 473. Of course, "one who offers a reward has the right to prescribe whatever terms he may see fit; and these terms must be complied with before any contract arises between him and the claimant, though, if the performance substantially corresponds with the terms of the offer, it will generally be sufficient." 21 Am. & Eng. Ency. of Law, 395–6; *Amis v. Conner,* 43 Ark. 337. Thus it has been held in Massachusetts that an "offer or reward by public advertisement is to be regarded as a conditional promise. Whoever would entitle himself to the reward must prove that he has performed substantially the service proposed in the advertisement, though it need not be performed literally." *Besse v. Dyer,* 9 Allen, 151. Here the complaint alleges that the reward was offered "for the 'arrest and conviction' of the culprit who had burglarized the" bank. The admission in the answer of the bank is "for the arrest and securing the conviction of the person who had committed said burglary." The respective answers of the other defendants seem to admit that the offer was as alleged in the complaint. The court found that the "bank orally offered a reward of one thousand dollars for the *arrest and conviction* of the person or persons who had committed the said crime." We assume that the offer was as found by

the court. It seems to be well settled that, where "a reward is offered for the arrest and conviction of a criminal, . . . both the arrest and conviction . . . are conditions precedent to a recovery of the reward." 21 Am. & Eng. Ency. of Law, 396–7; *Jones v. Phœnix Bank,* 8 N. Y. 228; *Furman v. Parke,* 21 N. J. Law, 310; *Blain & K. v. Pacific Exp. Co.* 69 Tex. 74, 6 S. W. 679. Of course, it is competent for a party offering a reward to waive strict, or even substantial, conditions of the offer. 21 Am. & Eng. Ency. of Law, 397. Here the bank, when sued, conceded its liability, and paid the money into court, and thereby seems to have admitted that somebody was entitled to the reward. The extent of this admission is simply to the effect that the person who committed the offense had been arrested by some of the claimants and convicted. The important question is, who, of the several claimants, are entitled to the reward? The action is upon contract. Only such claimants as substantially complied with the terms of the offer are entitled to any portion of the reward. The reward was offered for the arrest and conviction of the offender. What is meant by the terms "arrest and conviction?" This question has recently been answered by the supreme court of Maine in a case where it was held:

"An offer of a reward for 'the arrest and conviction' of an unknown perpetrator of a crime cannot be taken literally, but the conditions thereof are substantially performed by a person who obtains possession of the facts necessary to secure his arrest and conviction, *and gives them* to some proper person interested, although he does not himself make the arrest, but this and the prosecution are made by the proper officers." *Haskell v. Davidson,* 91 Me. 488, 40 Atl. 330.

In that case the claimants, in pursuance of the offer, made investigation, and discovered facts and circumstances which tended strongly to inculpate the accused, and thereupon disclosed such facts and circumstances to the deputy sheriff, who, upon process issued, made the arrest. The accused thereupon confessed and pleaded guilty and was sentenced,

the same as here. As said in that case, the claimant himself could not convict the offender. That case followed the ruling in *Besse v. Dyer,* 9 Allen, 151, and also *Crawshaw v. Roxbury,* 7 Gray, 374, where the offer was "for the apprehension and conviction" of the offender. In respect to that case it was there said:

"The court at *nisi prius* instructed the jury, in regard to the service to be performed to entitle the plaintiff to a reward, that the offer of a reward could not be taken literally, for, as the conviction must be in due course of law, requiring the intervention of the court and jury, a person might be entitled to the reward by becoming the prosecutor, and as such causing the arrest and conducting the case to a conviction, or he might be entitled to it by giving information which should lead to and produce the arrest and conviction of the offender. This instruction was unqualifiedly sustained by the full court," with SHAW, C. J., presiding.

It will be observed that in these cases the claimant participated in making the arrest to the extent of discovering and disclosing to the officer or person interested facts and circumstances tending to convict the offender. The case at bar is unlike those where the offer of reward is for information which will lead to the discovery or arrest and conviction of the offender. In such a case the giving of the information in compliance with the terms of the offer entitles the person doing so to the reward. *Williams v. Carwardine,* 4 B. & Ad. 621–3; *S. C.* 6 E. R. C. 133–9, and notes; Lawson, Contracts, §§ 12, 26. Thus it is stated as elementary: "Where a reward is offered for information, and several persons furnish distinct pieces, which combined make a perfect whole, it may be equitably apportioned amongst them; a bill of interpleader being maintainable for such purpose." 21 Am. & Eng. Ency. of Law, 399, 400. In support of that statement see *Fargo v. Arthur,* 43 How. Pr. 193; *Rea v. Smith,* 2 Handy, 193. The so-called findings of fact seem to be based

upon the theory that the offer of reward by the bank was for the furnishing of information or evidence leading to such arrest and conviction, instead of the offer which was in fact made.

The findings from 6 to 13, inclusive, contain lengthy recitals of evidence in respect to *Richards, Ovitz, Dawe,* and *Terrell,* without finding therein any of the facts material to the determination of the controversy as to who had in fact complied with the offer of the bank. The court finally, after the deduction of certain alleged costs, found that the remainder of the fund should be divided equally between *Richards* and *Dawe;* and yet there is no finding that they or either of them participated in making the arrest, which was one of the conditions imposed by the offer. The court does find that the plaintiff *Ovitz* made the arrest, without warrant, within the city limits, and that he was at the time marshal of the city, his official designation being "chief of police," and that he was on a salary. That he was such official is claimed to be the ground on which the court refused to allow him any portion of the reward. Counsel for the plaintiffs concedes that upon grounds of public policy a public officer cannot recover a reward for an act which it was his official duty to perform. They contend, however, that it was not *Ovitz's* official duty to make the arrest without process. The statute prescribed his duties as follows:

"He shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables, and be taken as included in all writs and papers addressed to constables. It shall be his duty to obey all lawful written orders of the mayor or common council; to arrest, with or without process, and with reasonable diligence to take before the police justice every person found in the city in a *state of intoxication* or engaged in any *disturbance of the peace* or *violating any law* of the state or ordinance of such city." Ch. 272, Laws of 1901.

We find nothing in this statute nor any other making it his duty to make such arrest without process.

The general rule undoubtedly is:

"Police and other officers may recover the reward offered when the information furnished or the service performed was *extra official,* but cannot recover the reward offered if the information furnished or the service performed was within the scope of the duties of such officer." 21 Am. & Eng. Ency. of Law, 400, 401; *England v. Davidson,* 11 Ad. & El. 856, 39 E. C. L. 254; *Neville v. Kelly,* 12 C. B. (N. S.) 740, 104 E. C. L. 740; *Davis v. Munson,* 43 Vt. 676; *Russell v. Stewart,* 44 Vt. 170; *Bronnenberg v. Coburn,* 110 Ind. 169, 174, 11 N. E. 29; *Gregg v. Pierce,* 53 Barb. 387; Mechem, Pub. Officers, §§ 376, 885.

Thus, it was held in the first of the Vermont cases cited:

"A sheriff acting in reliance upon a general offer of a reward for the capture of a criminal is entitled to the reward the same as though not a peace officer, where he succeeds in making the capture, *having no process in his hands.*"

To the same effect, *Gregg v. Pierce, supra,* and *Reif v. Paige,* 55 Wis. 496, 13 N. W. 473. We must hold that the mere fact that *Ovitz* was at the time city marshal did not preclude him from the reward or a portion thereof. In respect to the plaintiff *Kinn,* the court has made no findings, except to state by way of recitals that he voluntarily offered to take and did take *Ovitz* in his vehicle out to arrest Jelleff, and that on the way out *Ovitz* gave to him one of the revolvers he was carrying. All the claimants seem to have known of the offer of the reward prior to their doing the several acts by virtue of which they, respectively, claim the reward, or some part thereof. There is nothing in the statutes cited (Stats. 1898, secs. 132, 725*a*), nor otherwise, to prevent the reward from being apportioned among two or more claimants, who may have participated in complying with the terms of the offer.

All the several claimants were properly brought into the

case by interpleader, as prescribed by the statute. Sec. 2610, Stats. 1898.

We are unable to perceive on what theory costs were adjudged in favor of the bank, payable out of the fund in court. The bank was, confessedly, liable to pay the reward, and for costs incurred up to the time of its disclaimer and deposit of the reward in court. Sec. 2789. The whole amount of the reward so deposited in court must be deemed to be the property of the claimants who may ultimately be found entitled thereto. We perceive no reason why claimants who ultimately fail to recover should be exempt from paying costs, nor why those who ultimately recover should not be entitled to costs. The cause seems to have been tried upon a misapprehension of the law as applied to the facts of the case, and no findings of fact were made as prescribed by the statute. Sec. 2863, Stats. 1898. The result is that there are no findings nor evidence to support the judgment.

The evidence fails to disclose with reasonable certainty the rights of the respective claimants. It seems clearly to establish that *Ovitz* made the arrest, and is therefore entitled at least to share in the reward; but whether *Richards* can be held to have participated is not clear. Doubtless, if he brought information of his discovery, and secured the cooperation of *Ovitz* to return with him to make the arrest, then he would be legally a participant. If, after giving the information, he was prevented from accompanying *Ovitz* by the latter's subterfuge, then *Ovitz* should have no larger share than if *Richards* accompanied him, nor should *Richards* have less. If, on the other hand, *Richards* intentionally evaded any participation in the actual arrest, the mere giving of information to *Ovitz,* not in his official capacity, would not be a compliance with the offer of reward. As to *Kinn,* his share, if any, in the recovery must depend on the facts, as to *Richards,* whether the latter intentionally refrained from joining in the arrest, or was prevented by the acts of *Ovitz,* in which

*Kinn* participated. The trial court is the appropriate place for the determination of such questions. There must be further trial in this case. This is in harmony with what is said in *Brown v. Griswold,* 109 Wis. 275, 280, 85 N. W. 363, and *Bostwick v. Mutual Life Ins. Co.* 116 Wis. 392, 92 N. W. 246, 259.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded for further trial and proceedings according to law.

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VANCE and others, Respondents, vs. DAVIS, Appellant.

*May 29—July 3, 1903.*

*Equity: Deeds: Inequitable disposition of estate: Undue influence: Evidence.*

1. A conveyance by a widow of all her estate to a daughter, who, at the request of an elder brother and sister, had taken exclusive care of her mother for seventeen years, cannot be regarded as inequitable, so as to make it the duty of a court of equity to prevent its having effect.
2. In an action to set aside a deed from a mother to a daughter to the exclusion of the other heirs, the evidence, stated in the opinion, considered, and *held* to show that the situation was not such as to raise a presumption of fraud and undue influence, and require the daughter to disprove it.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Reversed.*

Action to set aside a deed executed and delivered by one Susan Vance to the defendant, her daughter, *Mary Jane Davis,* a few days before the death of said grantor, on November 20, 1901. The plaintiffs are the son and the children of the deceased daughter of said grantor. The premises consist of the 170-acre farm of the mother, upon which she had lived since the death of her husband in January, 1885; the same having first descended to his heirs at law, and been by

his three children quitclaimed to their mother in 1887. The defendant had, at the request of the other children, cared for the mother ever since 1885; not pecuniarily, but by looking after her, providing her daily and nightly companionship, and doing daily many acts of aid in her housekeeping, supplying her garden, and caring for her in frequent illnesses, and at the time of the execution of the deed being temporarily resident in the house with her mother. The deed was attacked on the ground of mental incompetence and fraud and undue influence. The court found that Susan Vance was mentally competent, though at the time ill and in pain from an acute disease (*peritonitis*), of which she died three days later; that the deed was executed during the temporary absence of the plaintiff *John M. Vance* from the mother's bedside, was without the knowledge of the plaintiffs, or any of them, and was made secretly, under circumstances indicating that the grantor and grantee desired to keep knowledge of its execution from the plaintiffs; that defendant then and for many years before occupied a position of trust and confidence; that the deed was caused and brought about by the undue influence of defendant, and was for the purpose of cheating and defrauding the plaintiffs out of their estate of inheritance in said lands. As conclusions of law, the court declared "that the legal presumption of undue influence and fraud in procuring the deed from the grantor by the defendant, who at the time stood in a position of trust and confidence to said grantor, has not been overcome by any testimony in the case." Whereupon judgment was entered setting aside said deed, from which the defendant appeals.

For the appellant there was a brief by *Silbaugh & Bennett* and *Higbee & Bunge,* and oral argument by *J. A. Bennett* and *E. C. Higbee.*

For the respondents there was a brief by *C. W. Graves* and *Smith & Griffin,* and oral argument by *Mr. C. J. Smith* and *Mr. Graves.*

DODGE, J. The judgment rendered by the trial court was based upon two positions very definitely declared in an opinion filed and in the formal findings. Those were, first, that conveyance of the whole farm to the defendant, to the exclusion of the son and grandchildren of the grantor, was inequitable, and that it was the duty of a court of equity to prevent its having effect; secondly, that the situation was such as to raise presumption of fraud and undue influence, and require defendant to disprove it. The specific findings of fact are, of course, to be read in the light of these preliminary positions assumed by the trial court. *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140; *Hill v. American Surety Co.* 107 Wis. 19, 26, 81 N. W. 1024, 82 N. W. 691; *Kelley v. Crawford,* 112 Wis. 368, 372, 88 N. W. 296.

We cannot at all agree with either the fact or the law of the first of these views. Seventeen years of devoted attention from defendant, coloring her whole existence, controlling and modifying her life plans, and this, too, at the request of her elder brother and sister, who treated the situation as relieving them from substantially all filial responsibility, certainly might justify the parent in recognizing an equity of gratitude for which any pecuniary compensation she might be able to make would be no more than adequate, from her point of view, and certainly ought not to be subject of complaint by these other children, who had so promptly and completely transferred to the defendant's shoulders the filial burdens which they should have shared with her equally. So much for the facts, of which more will appear in discussion of other questions. As to the law, the position of the trial court was also fallacious. The highest equity which courts can consider is the right of an individual to dispose of his property as he chooses. The hope of inheritance which any child may indulge during a parent's life bears no comparison in the eye of the law with the right of disposal by the parent. If Mrs. Vance, of her free will, gave this property to the defendant,

there is no duty of equity or conscience to thwart that will. The only question for the court, therefore, was whether the deed was the product of her own volition.

Approaching, then, the main question—whether the proofs established undue influence, either directly, or as result of an unrebutted presumption arising from the situation—it should first be noted that there is absolute lack of any direct evidence of subordination of the mind or will of the mother to that of the daughter; no proof that the slightest suggestion was ever made by the latter, or by any one in her interest. The fact does appear, on the other hand, that the mother's purpose and desire to make the conveyance in question were her own, at the moment of directing its preparation and of executing it. Of course, this fact alone does not exclude the possibility that her mind might have been preliminarily subjected to such influences as to destroy its autonomy, and to make her declarations and acts, even in the absence of the other person, the result of the latter's domination. Ordinarily, however, the free and intelligent declaration of a purpose to a third person, while relieved from the personal presence and control of the supposed influence, is a most cogently probative fact against that subordination of the grantor's will which must exist to warrant the nullification of her act. *Conley v. Nailor,* 118 U. S. 127, 135, 6 Sup. Ct. 1001; *Jackman's Will,* 26 Wis. 104, 111; *Marking v. Marking,* 106 Wis. 292, 295, 82 N. W. 133; *Deck v. Deck,* 106 Wis. 470, 82 N. W. 293; *Citizens' L. & T. Co. v. Holmes,* 116 Wis. 220, 93 N. W. 39, 43. Absence of such direct proof is, however, not final, for, in apparent contradiction of the ordinary rule requiring clear and direct proof of fraud, this and other courts have recognized the necessity of casting the burden of negative proof upon one who profits from a position of confidence and control by a conveyance of such character and made under such circumstances as to suggest improbability that it is the free act of the grantor, and probability that it is due to influence of the

beneficiary, which his confidential relation makes easy, but renders difficult or impossible of direct proof. The first thoroughly discussed case in this court recognizing the necessity for raising such a presumption was *Davis v. Dean,* 66 Wis. 100, 26 N. W. 737, succeeded by *McMaster v. Scriven,* 85 Wis. 162, 172, 55 N. W. 149; *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75; *Doyle v. Welch,* 100 Wis. 24, 75 N. W. 400; *Disch v. Timm,* 101 Wis. 179, 77 N. W. 196; *Small v. Champeny,* 102 Wis. 61, 78 N. W. 407; *Fox v. Martin,* 104 Wis. 581, 80 N. W. 921; *Loennecker's Will,* 112 Wis. 461, 88 N. W. 215. Many forms of words have been used to express the conditions under which such a presumption is aroused, more or less exhaustive according as one or many circumstances were made prominent by the evidence and urged by argument. In *Davis v. Dean* the grounds were stated as relation of trust and confidence, absence of any reason for preferring the grantee, "the suspicious circumstances under which the conveyances were made," and the injustice to the legal heirs. The "suspicious circumstances" so summarized included many, such as active secrecy by way of deluding or persuading away certain of the relatives, and, prominently, that the declaration of the grantor's wishes, if made at all, was made while alone with the grantee, for he conveyed directions to the scrivener. In *McMaster v. Scriven* it is said not to be sufficient that the circumstances beget mere suspicion. In *Doyle v. Welch* the elements were summarized as conveyance by aged person of entire property, without consideration, to one in position of trust and confidence, under circumstances of secrecy. That was said, however, with reference to a situation involving many other circumstances suggesting influence—notably, that the grantor's resolution to convey to the defendant was brought about in a private interview between them, and that directions to the scrivener were all given by her, and, when ready, a hasty and private interview with the attorney was arranged for formal execution.

In *Small v. Champeny* it was said that such presumption arises only "because of circumstances appearing which satisfactorily suggest the wrong, and it is not till such circumstances appear that it can properly be said the burden of proof to disprove wrong is on the person charged." In *In re Loennecker's Will* the rule is stated that essential to such presumption are a subject unquestionably susceptible to undue influence; also some clear evidence of opportunity, and a disposition on the part of the benficiary to exert such influence. It is also reiterated that, in case of deeds, secrecy is a significant circumstance—more so than in execution of wills, about which testators usually desire privacy. Of course, in each of these cases the several forms of expression were used with reference to the facts before the court. Any of the circumstances mentioned, and probably many others, may be present to so slight extent as to hardly arouse suspicion, or so extremely as to strongly suggest influence. Thus the word "opportunity" has almost uniformly been given prominence where a private interview is shown to have taken place between grantor and grantee upon the subject of the conveyance, the result of which was a direction transmitted by the beneficiary for the preparation of the instrument. That word has not been used to express a mere possibility of private interviews, as between people in the same house, where there was no proof that any such took place. Again, the word "secrecy" has usually been applied to active efforts by the beneficiary to exclude persons whose presence would have been natural, not to mere absence of such proclamation as is not usual with those freely making conveyances. The object of all such rules of law is the promotion of justice, and they must be limited by the reason of their existence. While it is an outrage that a doting and confiding parent be coerced into giving property where she would not, it is no less an outrage that her will to give it to any particular child be thwarted by casting impossible burdens of exculpation upon such

donee. The rule of presumption of undue influence, and resulting invalidity of conveyances to those in confidential relations, which, within proper limitations, is salutary, will become a reproach to the law if it serve to defeat free and intentional gifts under such circumstances as ordinarily accompany them.

This record before us discloses the not unusual event of preference by an aged parent of one child over the others in the final disposal of the property, the parent's use of which is practically ended. Perhaps the completeness of the preference in the present instance is unusual, but so is the merit of the favored child, as compared with the others. She, the youngest child, at the solicitation of her brother, the eldest, assumed at her mother's widowhood, and for some seventeen years bore, substantially the entire filial duty of children to an aged mother, of daily and nightly aid and care, not involving so much of pecuniary assistance as of that personal service and responsibility which, while not easy of description or exact definition, constitutes a continual burden of thoughtfulness upon the daughter, and adjustment of her whole life and of each day's affairs to the needs of the mother, and which changes the declining years of the parent's life from a period of loneliness and discomfort to one pervaded by a sense of affectionate guardianship and aid. Could such services be rendered by a stranger, even the portion of them devoted to the material comfort of this aged woman during this term of seventeen years would have justified mere pecuniary compensation quite considerable in amount. Doubtless from such a period of devoted service on the one hand, and appreciative dependency on the other, resulted a relation of trust and confidence, which, by one so disposed, might be utilized to persuade the mother into donations contrary to her own independent wish, and transactions beneficial to the daughter must be carefully scrutinized; but to hold that, where such relation exists, no gift can stand, unless the daughter can

fully and directly prove absence of undue influence, is to cast a penalty upon filial regard and attention, and a premium on unfilial neglect. Ordinarily, full direct proof in negation of undue influence can consist only in the testimony of the beneficiary, and that she is forbidden to give in most cases. We cannot agree with the trial court that the preference of this only surviving daughter, after all her years of devotion and service, was unnatural or improbable. The mother considered, whether the fact be so or not, that the son had already received a substantial share of the family property. She also felt aversion to diverting any of her property into the family of the husband of her deceased daughter, who had married again. It is shown that some six years before her death she had intended a division of property by which both the son and the other daughter were to receive a share, but even then she considered the defendant entitled to considerably more than both of the others. Subsequent to that time she had been the recipient of six years more of service from the defendant, and the other daughter had died, which had materially modified her views as to any duty to make benefice in that direction. We cannot agree with the trial court that a change of the purpose existing in 1895 indicated vacillation or weakness of purpose in Mrs. Vance. It is declared as essential to the presumption relied on that there be proof of a subject unquestionably susceptible to undue influence. That element is by no means clearly established in this case. Mrs. Vance appears from all the evidence to have been clear-headed, vigorous, and decisive, notwithstanding her eighty years. It exhibits her treating with her tenants, explaining and discussing relative quality of different parcels of land for different crops, actively participating in salvage of household goods at the burning of her daughter's house, when, by the way, she first selected and secured the articles belonging to herself before proceeding to save others. In all the incidents of her relations with her children, and especially with the defend-

ant, which crop out through the testimony, there is pretty clear suggestion that the old lady's choice dominated. Her final illness was not of a character to materially affect her mental condition, and the testimony of physician, notary, and neighbor indicates comprehension and definiteness of purpose, coupled with readiness to express disagreement with views of those with whom she conversed. Age and illness are, of course, proved, and in sufficient degree to constitute some evidence of susceptibility to urgency or coercion, but they are strongly rebutted by other circumstances and events. Any inference of disposition on defendant's part to influence her mother can rest only on mere suspicion and conjecture. So far as the evidence goes, it is in direct negation thereof. True, that evidence is defendant's own statement that she refused to allow her mother to talk with her on the subject, but it is entitled to some weight when wholly without discredit from any known fact. That defendant secured to her mother opportunity to speak her wishes to an indifferent person—a neighbor—instead of indicating any desire to exert pressure, suggests quite the reverse. It enabled the giving of instructions if the old lady's mind was made up, but it also gave opportunity to invite conference with her children, or either of them, if she wished it.

Again, as to the element of opportunity for defendant to influence her mother, there was no proof such as characterized most of the cases cited. True, defendant is shown to have been persistently attendant at the bedside; but, so far as any evidence goes, the subject of disposition of property was not discussed. There can hardly be said to be opportunity to improperly influence the mind of another on any subject unless something is said with reference thereto. In all the other cases where presumption of undue influence was raised, there was proof of opportunity in this sense. Private interviews were shown, at which the grantor's assent to the questioned conveyances was claimed to have been given to the bene-

ficiary. Here, as in *McMaster v. Scriven,* 85 Wis. 162, 55 N. W. 149, it does not appear that defendant had any knowledge of the intended disposition of the property until after it had been declared to a neighbor for the purpose of being communicated to the scrivener. The element of secrecy is completely negatived by plaintiffs' own evidence. The notary called in was an intimate friend of the plaintiff *John Vance.* He came openly in presence of one, if not two, of the plaintiffs—*Mrs. Alling* and perhaps *Jessie Mills.* His seal and blank deeds declared his errand. He wrote the deed in a room to which all those present had access. His acts could have been observed by *Mrs. Alling,* and that they were observed by and known to her is strongly suggested by the fact that she does not take the stand to assert anything to the contrary. He testifies there was no appearance of secrecy. Almost the only suggestion in that direction is the absence of *John Vance,* and counsel attempt to give a color of seizing an opportunity of a mere temporary absence. This coloring, however, has no support in the evidence. *John Vance's* attendance upon his mother was not characterized by such persistency as to necessitate any effort to find him absent. While he called daily, and sometimes twice a day, during his mother's last illness, they were mere calls, and not more. True, he might have been sent for, but for twelve years his mother had managed her affairs without his aid; and if, as appears to have been the case, she had reached a decision, it is not surprising that she should see no reason for breaking a habit of so many years' standing. The omission to procure the presence of *John Vance,* under the circumstances, was not such secrecy as suggests a wrongful purpose.

The facts and circumstances thus referred to so fully distinguish this case from both the facts and the reasons which controlled those in which a presumption of undue influence has been indulged as to take it fully out of their doctrine. There was not enough to raise any such presumption against

the defendant, and, in the absence of any direct proof of such conduct on her part, the plaintiffs have failed to establish the cause of action set forth in the complaint, which therefore should have been dismissed.

*By the Court.*—Judgment reversed and cause remanded, with directions to enter judgment dismissing the complaint.

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LANGE, Appellant, vs. LA CROSSE & EASTERN RAILWAY COMPANY, Respondent.

*May 30—July 3, 1903.*

*Street railways: Municipal corporations: Ordinances: Franchise: Streets: Use by street railways: Rights of abutting lot owners: Eminent domain: Condemnation: Injunction: Pleading: Appeal and error.*

1. Sec. 1862, Stats. 1898, expressly grants common councils of cities power to pass ordinances granting to street railway companies the right to use streets within the corporate limits for the purpose of laying tracks and running cars thereon. *Held*, since such ordinances have the force and effect of a statute of the state, they are not subject to revision by the courts on the mere ground of inexpediency or impropriety at the suit of an abutting lot owner.
2. Under sec. 1863*a*, Stats. 1898, as amended by ch. 306, Laws of 1899, and ch. 465, Laws of 1901 (authorizing condemnation proceedings by a street railway having requisite authority from the common council of the city wherein it is located), an ordinance granting the use of streets to a street railway company only authorizes such corporations to use streets as against the rights of the public, and not as against private owners.
3. In an action to enjoin a street railway from constructing its tracks on an abutting owner's half of the street, it appeared from the allegations of the complaint, among other things, that the defendant threatened to enter upon the plaintiff's premises and permanently occupy the same under claim of right with-

**out making any compensation therefor, and that plaintiff had not waived any of his legal rights. *Held*, that plaintiff was entitled to compensation as a condition precedent to the placing of such tracks in front of his premises, and it was error to sustain a demurrer to the complaint.**

APPEAL from an order of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an appeal from an order sustaining a demurrer to the complaint in an action to nullify and avoid an ordinance of the common council, so far as the plaintiff is concerned, and to restrain the defendant from constructing, maintaining, or putting upon Second street, in front of the plaintiff's lot and dwelling house, in La Crosse, the track or tracks of its electric railway, with cross-overs, switches, turn-outs, poles, and overhead wires, etc., and from exercising any rights or privileges under the ordinance, so far as the plaintiff is concerned. The complaint alleges, in effect, the incorporation of the defendant under the laws of this state as a commercial street railway, with rights, privileges, and franchises, and power to take and hold real and personal property of any individual; that Second street is the narrowest street in the city, and the plaintiff's lot and dwelling house abut thereon; that the Chicago, Burlington & Quincy Railway Company now occupies and uses the larger portion of said street, with double tracks, under valid ordinances of the city; that the plaintiff is required, under valid ordinances, to maintain sidewalks and boulevards in front of his premises, which necessarily narrow the street; that the common council passed an ordinance June 14, 1902, granting to the defendant the right to construct and perpetually maintain and operate a single-track electric railway along and upon said street, between the east curb of said street and the said double tracks of the Chicago, Burlington & Quincy Railway Company, directly in front of the plaintiff's lot, with cross-overs, convenient and proper switches, and turn-outs, poles, wires, and

side tracks; that the operation of said road would in no way tend to relieve the travel on said street; that the construction, maintenance, and operation of said railway track along said Second street in front of the plaintiff's premises would hinder and prevent the public from using the street, and would exclude travel, passage, and business therefrom, would exclude all vehicles, and would destroy the use of the street as a public thoroughfare and street, and would create and become a public nuisance, and a private nuisance to the plaintiff; that the construction, maintenance, and operation of said railway track along and upon said street in front of the plaintiff's said lot, premises, and dwelling house would deprive the plaintiff of any use of the street or thoroughfare, or of any street or highway, for his said dwelling house and lot, and prevent his having any ingress or egress thereto, place a dangerous obstruction in said street, and serious and irreparable damage and injury would necessarily result to the plaintiff in his use and enjoyment of said lot, premises, and dwelling house; that he would not only suffer great general damages and injury, but special damages and injury, which would be not less than $2,000, which the plaintiff sets up as special damages in this action; that the ordinance mentioned authorized the defendant and its successors and assigns to cross, at grade, any and all intervening streets and alleys along the line of its road, as designated therein, subject, however, to the supervision of the common council, provided that the permission, authority, and privileges thereby granted should not be construed, in any manner, to divest owners of abutting property on such street from any legal rights they may possess, nor relieve the defendant, its successors and assigns, from responsibility for legal damages, and required the defendant to pay the city $500 each year, but that provision was expressly repealed by ordinance July 11, 1902. The complaint further alleges that the defendant threatens and intends to, and the plaintiff believes that it will, unless restrained by the

order and injunction of the court, enter upon said street, and lay and put down a railway track, with cross-overs between the tracks, and convenient and proper switches, and turn-outs, poles, overhead wires, and side tracks, where necessary, and permanently and perpetually exercise the rights and privileges pretended to be granted by said ordinance to it, and is about to particularly enter upon that portion of the street adjacent to and in front of the plaintiff's said lot, premises, and dwelling house, and lay and put down its railway track, with cross-overs between the tracks, and convenient and proper switches and turn-outs, poles, overhead wires, and side tracks, where necessary, and permanently and perpetually exercise said rights and privileges pretended to be granted under said ordinance, and permanently and perpetually operate its said railway for the purposes and in the manner set forth in said articles, and carry passengers, freight, merchandise, mail, and express; that the plaintiff has not given the defendant his consent or permission to construct such railway upon or along said Second street in front of his said lot, premises, and dwelling house, nor to enter thereon for the purpose of grading the same, or laying ties or constructing its railway thereon, or stretch electric wires over and across the same, nor has the defendant entered into any agreement with the plaintiff as to how and upon what terms such entry may be made, if at all, or any agreement fixing plaintiff's damages on account of such entry and the doing of such acts by the defendant, nor has the defendant taken any steps, by condemnation or otherwise, to enter thereon, and to do and perform such acts as aforesaid for the purposes which it proposes, but, on the contrary, claims plaintiff has no interest or rights with reference thereto.

For the appellant there was a brief by *Bleekman & Bloomingdale,* and oral argument by *A. E. Bleekman.*

For the respondent there was a brief by *Higbee & Bunge,* and oral argument by *E. C. Higbee.*

CASSODAY, C. J. The principal object of bringing this action may have been, as claimed by counsel for the defendant, to nullify and set aside the ordinance in question. The statute expressly gave to the common council of the city power to pass such ordinance. Sec. 1862, Stats. 1898. This court has repeatedly held that an ordinance of a city granting such corporate rights and franchises "has the force and effect of a statute of the state." *State ex rel. Rose v. Superior Court of Mil. Co.* 105 Wis. 672, 673, 81 N. W. 1046, and cases there cited; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 511–513, 83 N. W. 851. The common council having the power to pass such ordinance, and the act of doing so being legislative in character, the same is not subject to revision by the courts on the mere ground of inexpediency or impropriety. But such ordinance only covers, and could only cover, such rights as the common council had the power to grant. *Id.* It in no way purports to affect, nor could it affect the rights of abutting lot owners. *Id.* In the last case cited it was said "that this law was only intended to authorize corporations to use streets with the consent of the city for carriage of freight, *as against the rights of the public,* and not as against private owners, leaving such private owners in full possession of their rights to stop the construction, insist on compensation, or give their consent, as they chose;" citing *Krueger v. Wis. Tel. Co.* 106 Wis. 96, 81 N. W. 1041. Of course, the owner of land abutting on a street owns the fee to the center of the street, subject only to the public easement. *Id.* The statute, as it now stands, authorizes proceedings for condemnation by a street railway company having the requisite authority from the common council of the city wherein it is located. Sec. 1863*a*, Stats. 1898, as amended by ch. 306, Laws of 1899, as amended by ch. 465, Laws of 1901; *Younkin v. Milwaukee L., H. & T. Co.* 112 Wis. 19, 87 N. W. 861. It follows that the plaintiff is not entitled to have the ordinance nullified and set aside.

2. But that does not give the defendant any right to construct its tracks, or place any burden on the plaintiff's half of the street in front of his lot, without compensation. It appears from the complaint that the defendant has not resorted to condemnation proceedings, nor obtained any consent or permission to construct its railway in front of the plaintiff's premises. It is, moreover, alleged, in effect, that the defendant threatens to, and the plaintiff believes that it will, unless restrained by the court, enter upon the street in front of the plaintiff's premises, and permanently lay and put down its railway tracks, etc., and perpetually maintain the same, without compensation to the plaintiff. The plaintiff has the right to compensation, as a condition precedent to the placing of such tracks, etc., in front of his premises. *Ford v. C. & N. W. R. Co.* 14 Wis. 609; *Davis v. La Crosse & M. R. Co.* 12 Wis. 16; *Powers v. Bears,* 12 Wis. 213; *Shepardson v. M. & B. R. Co.* 6 Wis. 605; *Younkins v. Milwaukee L., H. & T. Co.* 112 Wis. 20, 87 N. W. 861. The complaint is, in effect, that the defendant threatens to enter upon the plaintiff's premises, and permanently occupy the same, under claim of right, without making any compensation therefor. This the defendant has no right to do. As indicated, the plaintiff has not waived any of his legal rights by giving consent or permission or otherwise.

*By the Court.*—The order of the circuit court is reversed, and the cause is remanded with direction to overrule the demurrer, and for further proceedings according to law.

WALKER, Respondent, vs. VILLAGE OF ONTARIO, Appellant.

*May 30—July 3, 1903.*

*Bridges: Traction engines: Negligence: Personal injuries: Instructions to jury: Ordinary care: Contributory negligence: Evidence: Excessive damages.*

1. In an action for injuries caused by the falling of a bridge while plaintiff was attempting to pass over it with a traction engine, in instructions to the jury on the question of ordinary care on the part of defendant, it is not error to call to the jury's attention that what would be ordinary care in discovering the insufficiency of bridges before the use of traction engines, might not be ordinary care when it was known that traction engines, many tons in weight, frequently passed over them under the sanction of express law.
2. In an action against a town for injuries caused by the breaking of a bridge while plaintiff was attempting to pass over it with a traction engine, it was insisted that the evidence showed that the breaking down of the bridge was caused by the engine running off the insufficient plank track. It appeared that plaintiff failed to comply with ch. 197, Laws of 1899 (requiring the operator of a traction engine before crossing a bridge or culvert to span it with planks of designated dimensions); that all the six eye-witnesses of the accident testified that the engine did not leave the planks while crossing the bridge, except one who was not asked such question, and no witness testified that the engine left the planks. There was testimony, introduced as impeaching evidence, to the effect that on the afternoon of the day of the accident the engineer told the witness the engine ran off the planks, and at the same time showed witness a plank, lying at the south end of the bridge, which had on it a mark of an engine wheel. This testimony was denied by the engineer, and was not shown to have been so closely connected with the accident as to be a part of the *res gestæ*. *Held*, while the mark on the plank might be properly considered as affirmative evidence, it did not rise to the dignity of a *scintilla* of proof that the engine ran off the plank before the bridge broke down, and hence was insufficient to put that fact in controversy.
3. In such case the evidence considered, and *held* to demonstrate absence of causal relation between the failure to comply with

the statute in planking the bridge and the breaking down of the bridge, and to relieve plaintiff of any charge of contributory negligence.

4. In an action against a town for injuries caused by the breaking of a bridge while plaintiff was attempting to pass over with a traction engine, pieces of the bridge were admitted in evidence to show its condition at the time it broke down. It appeared that the wreckage from the bridge was piled in a mill yard where it remained exposed to the weather from August to the following June, when pieces were sawed off and introduced in evidence on a former trial, and that after the trial they were kept in a dark dry room until the instant trial. There was testimony by witnesses who saw the timber after the accident, to the effect that the pieces introduced in evidence appeared to be in about the same condition as when the bridge broke down, except that they were a little more decayed. *Held*, that the pieces of the bridge were properly received in evidence.

5. In an action against a town for injuries caused by the breaking of a bridge while plaintiff was attempting to cross over with a traction engine, an instruction to the jury, in substance, that it was plaintiff's duty to exercise ordinary care; that ordinary care in the instant case would be such as was suitable to or commensurate with the risk which would naturally attend such circumstances of crossing the bridge, and that it was fair to say that plaintiff should exercise a higher degree of care, in order to constitute ordinary care, than he would be required to exercise in going over with an ordinary load, is *held* to cover a requested instruction, in substance, that the care required to be used by a traveler in passing along a highway is measured by the perils obviously to be encountered; that knowledge of the possible insecurity of the bridge, and that the load to be put on it was unusual in weight, should be imputed to plaintiff, and that the plaintiff could not assume that the bridge would safely bear up a traction engine, because it had for many years safely stood the test of ordinary wagon travel over it.

6. A strong and vigorous man was injured by being pinned beneath the wheels of a traction engine when it broke through a bridge and fell a distance of eight feet, and was only released by raising the engine with jackscrews. One leg was crippled so that he was obliged to walk with a crutch or cane, and there was expert testimony tending to prove the injury permanent. *Held*, that a verdict of $2,800 was not excessive.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries sustained by the plaintiff while crossing a small wooden bridge in the defendant town with a traction engine on the forenoon of August 26, 1899. The bridge in question was twenty feet in length from one abutment to the other, and was constructed on wooden stringers, eight inches square and twenty-four feet in length, on each side, which reached two feet over the abutment at each end, and were supported by "A" braces, made of timber of the same size tenoned into the stringers over the abutment, and reaching to the apex five feet above the stringers, from which apex a king bolt went down through the stringers and through the floor beam below the stringers. The floor beam reached across the bridge from stringer to stringer, and supported the joists of the bridge, which reached from the abutment on either end to the floor beam. On the day in question the plaintiff was employed as steersman on the traction engine in question, and was riding on it across the bridge in company with one Ritske, one of the owners of the engine, and the engineer. When the engine reached a point about the middle, or a little past the middle, of the bridge, the ends of the braces flew up on one side, the stringers broke, and the engine was precipitated, a distance of about eight feet, into the water below, and the plaintiff was quite severely injured.

The following special verdict was rendered by the jury:

"1. Was there an insufficiency or want of repair in the bridge in question which caused the plaintiff's injury? *A.* Yes. 2. If you answer the first question in the affirmative, then did the defendant village have actual notice of such insufficiency or want of repair prior to the accident to the plaintiff? *A.* Yes. 3. If you answer the first question in the affirmative, then had such insufficiency or want of repair existed for such a length of time that the officers of the village, whose duty it was to maintain and repair such bridge,

in the exercise of ordinary care, ought to have discovered such insufficiency or want of repair in time to have remedied or repaired the same before the accident. *A.* Yes. 4. If you answer the first question in the affirmative, then was such insufficiency or want of repair the proximate cause of the plaintiff's injury. *A.* Yes. 5. Was the plaintiff, or the man Ritske, while in the act of crossing, or in attempting to cross, the bridge in question, guilty of any want of ordinary care which contributed to the plaintiff's injury? *A.* No. 6. If the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* Two thousand eight hundred dollars ($2,800.00)."

A motion by the defendant for a new trial was overruled, and judgment entered upon the verdict in favor of the plaintiff, from which the defendant appeals.

*C. W. Graves,* for the appellant.

For the respondent there was a brief by *Masters & Graves,* and oral argument by *C. M. Masters.*

WINSLOW, J. The first contention made by the appellant is that the answers to the second and third questions of the special verdict are unsupported by the evidence. We do not deem it necessary, or even profitable, to review the evidence upon these questions in this opinion. We have carefully examined it, and content ourselves with the general statement that in our opinion the evidence was entirely sufficient to support the findings of the jury.

Passing to the legal questions raised, we find the claim made that the court erred in his charge to the jury in submitting the third question. The court first instructed the jury, on this question, that the duty of highway officials to discover defects in a bridge is greater than the duty resting upon the traveler. This proposition is not complained of, but complaint is made because the court then proceeded as follows:

"Can you say, as jurors, that the care which might have been sufficient, of such officials, in discovering the sufficiency

of a bridge before the use of steam engines in this locality, would be ordinary care in discovering the sufficiency of a bridge which the law now requires shall be reasonably safe for the passage of an engine of the weight of the one here in question, when being moved or propelled in the exercise of ordinary care upon the part of the person in charge of such engine?"

We are unable to perceive any error in this instruction. The question as to what constitutes ordinary care is nearly always a relative question, depending on the surrounding circumstances and conditions. It seems to us very evident that acts which would fulfill every reasonable requirement of ordinary care in the inspection of a bridge over which nothing heavier than an ordinary loaded wagon ever passed might not constitute ordinary care when it was known that traction engines many tons in weight frequently passed over them under the sanction of express law. This is the idea contained in the instruction, and we find no error in it.

It is next claimed that the evidence shows that the plaintiff and Ritske were guilty of contributory negligence, as matter of law, because they failed to span the bridge with planks, as required by ch. 197, Laws of 1899. It was held upon the former appeal in this case (111 Wis. 113, 86 N. W. 566) that this law, which requires the bridge to be spanned "with hardwood planks at least two inches thick and twelve inches wide, so that the engine shall rest thereon in crossing," was sufficiently complied with if the tracks on which the wheels of the engine run are of the required thickness and width, though composed of narrower planks laid side by side; also, that failure to comply with the requirement is not a defense to the town, unless there is some direct causal relation between the failure and the accident. These propositions are not now combated; but it is claimed that the evidence on the present trial affirmatively shows that the bridge was not spanned with planks, even in accordance with the spirit of

the statute, as explained in the former opinion, and that it is now shown that the breakdown of the bridge was caused by the engine running off from the insufficient plank track. The bridge was twenty feet in length. The evidence on this trial seems to show conclusively that but six planks were used in spanning the bridge, being three on each side, and that two twelve-foot planks, ten inches wide, were put down end to end for the wheels on each side of the engine to travel on. These spanned the bridge completely, but did not make the tracks of the required width. Then it appears that a fourteen-foot plank, eight inches wide, was put at the side of and about midway of the two twelve-foot planks on each side, thus breaking joints, but leaving about three feet at each end of each track which was only ten inches wide. Thus it seems to appear that the statute was not complied with, even with the liberal construction given it on the former appeal. But, while this is true, a careful reading of the testimony shows that it is proven without substantial contradiction that the engine did not run off from the plank track, but that all the wheels were on the track when the bridge went down, thus demonstrating that there was no causal relation between the failure to comply with the statute and the breaking down of the bridge. All of the eyewitnesses of the accident, six in number, testify that the wheels did not run off the plank, except one, who was watching the crossing of the bridge from the window of a mill near by, and was not asked the question, but said that the engine was in the center of the bridge when the bridge went down. No witness testifies that the wheels left the plank, and the only testimony which can be claimed to point in that direction comes from certain impeaching evidence introduced by the defendant in the following manner: Ritske, the owner of the engine, who was acting as engineer at the time of the accident, after having stated that the engine did not run off the plank, was asked, on cross-examination,

if he did not state to one Rittenhouse, after the accident, that the wheels of the engine ran off the plank, and denied having made such a statement. Rittenhouse was called by the defense, and testified that in the afternoon of the day of the accident he talked with Mr. Ritske, and that Ritske told him that one wheel went off the plank, and that Ritske showed him a plank, lying on the south end of the bridge, which had a mark on it of an engine wheel, which appeared to have run off the edge of the plank about three feet from the end. This conversation was introduced simply as impeaching evidence, and was not shown to have been so closely connected with the accident as to be a part of the *res gestæ,* and hence was not affirmative proof of the fact. While the mark upon the plank may perhaps be properly considered as affirmative evidence, it can hardly be said to rise to the dignity of a *scintilla* of proof that the engine ran off the plank before the breaking of the stringer. Of course, the engine left the plank when the bridge went down, and the mark so shown is just as likely to have been made after the bridge gave way as before. Under these circumstances, in view of the positive evidence of all who observed the accident that the wheels did not leave the plank before the accident, we cannot regard the evidence of the mark on the plank as sufficient to put the fact in controversy. This conclusion disposes of the claim of contributory negligence, and renders unnecessary any consideration of the correctness of the charge of the court on this subject.

A number of pieces of decayed pine timber were offered in evidence on the trial as having been a part of the bridge, and were received against objection, and this ruling is now urged as error. It appeared by the evidence that after the bridge broke down, in August, 1899, the wreckage was piled in a mill yard near by, where it remained exposed to the weather until June, 1900, when the plaintiff's brother sawed off the pieces in question, and they were introduced in evidence on

the former trial, held during that month. After that trial they were kept by plaintiff's brother in a dry dark room until the second trial of the action, in December, 1901. There was ample testimony to identify the pieces introduced in evidence as having been a part of the timbers of the broken bridge, and there was considerable testimony, by witnesses who knew the bridge and saw its timbers after the accident, to the effect that the pieces introduced in evidence appeared to be in about the same condition at the time of the trial that they were in when the bridge broke down, with the exception that they were a little more decayed. Under the circumstances, we think they were properly received in evidence. *Viellesse v. Green Bay,* 110 Wis. 160, 85 N. W. 665. The appellant relies on *Stewart v. Everts,* 76 Wis. 35, 44 N. W. 1092, where it was held to be error to allow pieces of a broken steel rail, which had been exposed to the weather for six months after the break, to be shown to the jury, in order to allow them to determine, from its appearance, whether the rail was sound when it broke. This ruling was based on the ground that persons of ordinary skill or knowledge could not draw any correct inference, from examination of the pieces, as to whether the rail was sound or not when the break took place; that the question was one for an expert. The court, however, very justly said: "It is not like the decay and rottenness of wood, the evidences of which are so clear and manifest that any person of ordinary intelligence can understand them." This language exactly fits the present case. The decay of wood is a slow and gradual process, varying somewhat according to the conditions and the nature of the wood, but quite well understood by all men of ordinary intelligence and observation. Knowing how the wood had been kept from the time the bridge broke down until the time of the trial, such men could easily arrive at an approximately correct conclusion as to its condition at the time of the accident.

The defendant requested that the following instructions be given to the jury in connection with question No. 5, but they were refused:

"The care required to be used by a traveler in passing along a highway is measured by the perils obviously to be encountered. So, in this case, knowledge of the possible insecurity of this bridge, and that the load he was purposing to put upon it was unusual in weight, will be imputed to the plaintiff. Travelers are bound to take notice of the fact, as a matter of common knowledge, that wooden bridges spanning streams will break down in case sufficient weight is put upon them. The plaintiff could not assume, and had no right under the law to assume, that this bridge would safely bear up a traction engine weighing over 9,000 pounds, because it had for many years safely stood the test of ordinary wagon travel over it. The plaintiff in this case must have known, and the law will impute such knowledge to him, that the weight which he was proposing to put upon the bridge in question was over two or three times greater than an ordinary loaded wagon, and that the strain upon the bridge timbers would be correspondingly greater; that there was greater danger in crossing it with this engine than there would be with a loaded wagon; and so he was bound to use a greater degree of care in crossing, or attempting to cross, than he would be bound to use in case he were attempting to cross with a loaded wagon; and the degree of care which he was bound to use must be determined by you under all of the facts and testimony in the case."

The sum and substance of these proposed instructions is that the care to be demanded of the plaintiff must correspond to the known risk, and that, in crossing an ordinary country bridge with a traction engine, he must exercise a greater degree of care than he would be required to exercise if he were crossing with a loaded wagon of ordinary weight. This is doubtless correct, but we think it was fully covered by the following instruction which the court gave the jury:

"The court has further said, in reference to the crossing with this engine, that it was the duty of both these men in

charge of this engine to exercise ordinary care, and ordinary care in this case should be such as should be suitable to or commensurate with the hazard or risk which would naturally attend the circumstances of crossing this bridge; that is, it would be fair for you to say, as jurors, in finding the fact in regard to this, that they should exercise a higher degree of care and diligence, in order to constitute ordinary care, than they would be required to exercise if going over with an ordinary load of stone or an ordinary load of produce."

It is claimed that the verdict is excessive. We do not think so. The plaintiff was a vigorous and strong man. He was pinned beneath the wheels of the engine when it went down, and only rescued by raising the engine with jackscrews. His bodily injuries were severe, and one leg is crippled, so that he is still obliged to walk with a crutch or cane. There is expert testimony tending to prove that the injury is permanent. Under these circumstances, we cannot say that the sum awarded by the jury is too great.

*By the Court.*—Judgment affirmed.

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WELLS, Administrator, Appellant, vs. TOWN OF REMINGTON, Respondent.

*June 1—July 3, 1904.*

*Highways: Injuries from defects: Negligence: Ordinary care: Evidence: Contributory negligence: Court and jury: Statutes: Repeal as affecting accrued rights of action: Action by parent for death of child.*

1. In an action by an administrator for the death of a minor alleged to have been caused by an insufficiency or want of repair of a highway, the evidence, stated in the opinion, reviewed, and *held* although there was a safe way for travel which might have been taken, the town was not relieved from the exercise of ordinary care in preventing a traveler from going upon a side track, connected with the main track and appar-

ently safe, but which the town authorities knew or ought to have known, to be unsafe.

2. To render a town liable for injury by reason of a defective highway, the object or defect causing the injury need not be within the traveled track, provided it is so connected with the traveled track as to render the same unsafe and inconvenient to those traveling thereon.

3. When the question of contributory negligence depends on facts from which conflicting inferences can be drawn the question is properly for the jury.

4. Under the provisions of sec. 4974, Stats. 1898 (providing that the repeal of a statute shall not remit, defeat or impair any right of action accrued under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal, but that all such rights of action created or founded by such statute, liability wherefor shall have been incurred before the time of such repeal, shall be preserved and remain in force notwithstanding such repeal, unless specially and expressly remitted, abrogated or done away with by the repealing statute), ch. 305, Laws of 1899, amending sec. 1339, Stats. 1898 (by providing "that no action shall be maintained . . . by a parent on account of injuries received by a minor child," and that such amendment shall take effect "from and after its passage and publication"), does not take away the right of a parent to maintain an action for the death of a minor child happening through the insufficiency or want of repair of a highway, which occurred two years before the passage and publication of such amendment of sec. 1339.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

This action was commenced June 19, 1899, to recover damages for the death of the plaintiff's intestate, caused by an alleged defect in the public highway, July 7, 1897. The defendant answered by way of admissions, denials, and counter allegations, and also alleged that the right of action was barred by the statute. Sec. 1339, Stats. 1898, as amended by ch. 305, Laws of 1899. At the close of the testimony the defendant moved the court to direct a verdict in favor of the defendant on four separate grounds, three of which were overruled by the court; and to each of such rulings the defendant

excepted, and urges the same in support of the judgment on this appeal. The court granted the motion on the other ground stated, and from the judgment entered upon the verdict directed in favor of the defendant the plaintiff brings this appeal.

*B. R. Goggins,* for the appellant.

*Geo. L. Williams,* for the respondent.

CASSODAY, C. J. The trial court directed a verdict in favor of the defendant on the sole ground that there was no evidence tending to prove that the alleged defect was within the public highway. To determine the correctness of this ruling, it is important to know the character of the defect and its location in respect to what was then the traveled portion of the highway, or the portion of the highway which was in a condition to invite travel, under the circumstances. It is undisputed that at the place in question the highway ran in a northerly and southerly direction, and was four or five rods wide, and fenced on both sides. It was crossed by Two-Mile creek, which was from two to four feet wide, and entered the highway from the east, flowing thence southerly, thence westerly, thence northwesterly, and thence in a westerly direction, in the form of a curve, to and through an embankment or dike leading across the valley. The creek valley was sandy, with much surface, flat, and from six to ten rods wide from north to south, and from five to six feet lower than the general level outside of it. For many years immediately before the time in question, the highway across the valley ran on the embankment or dike mentioned, the top of which was some five or six feet higher than the bottom of the valley. This dike was from fourteen to twenty feet wide at the top, and from twenty to twenty-four feet wide at the bottom, and as it came from the south, curved to the west until it reached the limit of the highway, and at that point there was a bridge sixteen feet wide and from sixteen to eighteen feet long, cross-

ing the creek, and from thence the dike ran directly north. As stated by the trial court, the dike "was reasonably safe for travel prior to the 28th or 29th of June, 1897, when an unusual flood carried off the bridge and covered the entire lowlands between the extreme banks described—some six to ten or twelve rods in width—with water to a depth of some three feet in most or all of that part of the highway." As early as, or earlier than, July 1, 1897, the flood carried away the bridge, leaving a break in the embankment of about forty feet, and so made or created a hole in the ground over which the bridge had been—extending eastward of the embankment some twenty feet, and being from ten to twelve feet or more in depth, and nine feet deep at its most easterly edge, on July 7, 1897. There was no more rain after June 30, 1897, and the water subsided rapidly. On the evening of the day on which the bridge went out, a fence was placed clear across the highway, on both sides of the creek, to prevent travel. The next day such fences were removed, except across the embankment, and the highway was thus open to travel, and from that time on teams passed north and south in large numbers, especially on the 4th day of July.

There is evidence tending to prove that the road commissioner for the previous year was at the *locus in quo* a day or two after the bridge went out, and after the water had gone down a depth of three feet on the general level, and with a pole sixteen to twenty feet in length probed the hole from the south end of the dike, at the break therein, and found it to be from thirteen to fourteen feet in depth; that teams were crossing at the time, and he reported these conditions to the town board; that he was there again on the morning of July 7, 1897, the day of the accident, and probed the hole again, but at no time sought to find how far the hole extended toward the east; that the valley had water over its surface until July 5, 1897, when there appeared a tongue or narrow strip of land, extending from the north bank of the valley to

the creek at the south, and right up to the large hole; that July 6, 1897, this dry strip was continuous from the north, except a little dead water near the north side of the valley; that on that same day some poles were placed across the creek, at a point where their north ends were about twelve feet southeast of the big hole; that on that day teams were crossing on such dry strip of land, going on the west side of the poles mentioned; that the dry strip had been covered with grass, but was mostly washed over with sand by the flood; that July 7, 1897, this dry strip of land, opposite the big hole, was about nine feet wide, and came right up close to the big hole (this did not include the dip in the overhanging sod, which had been undermined and had been covered by water, the body of the hole really extending under the edge of the dry strip); that directly east from the big hole, and nine or ten feet from it, was a mire hole, where several travelers had trouble; that there were wheel tracks—wagon tracks—along the dry strip of land for some time before the accident. It appears and is undisputed that previous to the flood, and while the bridge was in place across the creek, there had been for a long time a passageway or fording place, called the "main ford," which was used regularly by a large portion of the traveling public. That ford left the embankment several feet south of the south bend of the creek, and then went first in a northeasterly direction, and then curved toward the north, and crossed the creek at its southern bend, and then went in a northerly direction, and finally curved toward the west and entered the regular highway over the embankment. After the bridge went out and the fences which prevented travel were removed, the public resumed travel on the main ford, which, on the day of the accident, was covered with water for about three rods immediately north of the creek.

The plaintiff's intestate was a little more than seventeen years of age at the time of his death. He resided with his parents, eight and one-half miles northerly from the place of

the accident. On the morning of July 7, 1897, he left his home in good health, with a two-wheeled cart drawn by a horse or pony, destined to Mr. Winter's place, about one mile south of the place in question. There is evidence tending to prove that, in going south, he drove on the dry strip of land described, and that on his way home he started to drive over that same dry strip of land, between the poles mentioned and the deep hole. There is evidence tending to prove that a short time after one o'clock in the afternoon of July 7, 1897, a little boy discovered a boy's hat floating on the surface of the water in the big hole, and a horse's foot sticking up out of the water; that he gave the alarm, and the people in the vicinity came and found the horse or pony right on his back in the deep hole, and the cart bottom side up in the water, and the boy right under the cart, and the umbrella under the boy and farthest down; that the horse was still connected with the cart—the tugs hitched, and the pony checked up; that there was a short mark over the boy's left eye and temple, and a black spot on the left side of his neck, his pants were torn in two or three places, two lifts were off the left shoe heel, two slats of the floor of the cart and one thill were cracked or broken, and his hat was floating on the east edge of the hole—six or seven feet from the foot of the horse and about the same distance from the shore.

Such is a general outline of the evidence upon which the court directed a verdict in favor of the defendant. In doing so, the learned trial judge laid particular stress upon the fact that during all the time after the fences which prevented travel were removed, down to the time of the accident, there was a passageway (at the place in question) along which persons could pass with reasonable safety, and that there were no facts which would justify a finding that the town authorities ought to have foreseen that any traveler, in the exercise of ordinary care, was liable to wander up to the margin of the hole, several feet outside of any track or any way thereto-

fore used, or so near it as to be liable to fall into it. It is true that the "main ford"—so called—was a reasonably safe passageway at the time; but there is evidence tending to prove that such "main ford" was, at the time, covered with water for a distance of three rods immediately north of the creek. A stranger to the situation would not know, without testing it, whether such "main ford"—so covered with water—was free from holes and safe or not. At the same time, it is undisputed that there was a dry strip of land, extending from a point south of the creek to the north, between the poles mentioned and the deep hole, to the regular highway over the embankment, except that at the north end of such dry strip there was a little dead water; and in driving upon such dry strip it was, of course, necessary to cross the creek. There is evidence tending to prove that the town authorities knew, or ought to have known, the whole situation as it existed July 7, 1897. This being so, can it be said, as a matter of law, that the town authorities were justified in not foreseeing that a traveler might, in the exercise of ordinary care, drive upon the dry strip of land, instead of the "main ford," thus covered with water? There is evidence tending to prove that the dry strip of land was well calculated to invite travel, under the circumstances. It was apparently nine feet wide in the narrowest place. There is evidence that the water in the big hole was dark and roily. A stranger might not know that it was any deeper than the water covering the "main ford." The depth of the deep hole and the overhanging sod made it, especially, a question for the jury to determine whether it was defective or reasonably safe. There is evidence tending to prove that teams had been driven over that dry strip of land for some time prior to the accident. The mere fact that there was a safe way, which might have been taken, did not relieve the defendant from the exercise of ordinary care in preventing travelers from going upon a side track, connected with the main track and apparently safe, but which the town

authorities knew, or ought to have known, to be unsafe. This is illustrated by numerous adjudications in this court. A few only are cited: *Cartright v. Belmont,* 58 Wis. 370, 17 N. W. 237; *Wiltse v. Tilden,* 77 Wis. 152, 46 N. W. 234; *Schuenke v. Pine River,* 84 Wis. 669, 54 N. W. 1007; *Bills v. Kaukauna,* 94 Wis. 310, 68 N. W. 992. "To render a town liable for injury by reason of a defective highway, the object or defect causing the injury need not be within the traveled track, provided it is so connected with the traveled track as to render the same unsafe and inconvenient to those traveling thereon." *Slivitski v. Wein,* 93 Wis. 460–462, 67 N. W. 730, and cases there cited; *Carpenter v. Rolling,* 107 Wis. 559, 563, 83 N. W. 953.

2. The trial court very properly held that the question whether the deceased was guilty of contributory negligence was peculiarly one for the jury. It is claimed on the part of the defendant that it appears from the evidence that the deceased followed the creek, and drove with his near wheel in the creek and his off wheel on the shore, directly northwest, and headlong into the deep hole. The plaintiff contends that the evidence shows that he drove upon the dry strip of land between the poles mentioned and the deep hole, and that the cart slid off the overhanging sod and threw the pony into the deep hole, and that that accounts for the situation in which the cart, the pony, the boy, and the umbrella were found in the deep hole. Such questions and others were properly for the jury.

3. It is claimed that the plaintiff's right of action was taken away by ch. 305, Laws of 1899, which amended sec. 1339, Stats. 1898, by providing "that no action shall be maintained . . . by a parent on account of injuries received by a minor child." That chapter provides that it should "take effect and be in force from and after its passage and publication," which was nearly two years after the right of action, if any, accrued. Such statute is by its terms pros-

pective. Besides, the general statutes provide in effect that the repeal of a statute "shall not remit, defeat or impair any . . . right of action accrued under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal," but that "all such . . . rights of action created by or founded on such statute, liability wherefor shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal, unless specially and expressly remitted, abrogated or done away with by the repealing statute." Sec. 4974, Stats. 1898. The case comes squarely within the repeated rulings of this court. *Pier v. Oneida Co.* 102 Wis. 338, 78 N. W. 410; *H. W. Wright L. Co. v. Hixon,* 105 Wis. 153, 80 N. W. 1110, 1135; *Mauch v. Hartford,* 112 Wis. 40, 47, 87 N. W. 816. See *Mueller v. Milwaukee,* 110 Wis. 623, 86 N. W. 162. The trial court properly held that the alleged cause of action was not taken away by the statute cited.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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## In re Downing's Will.

*June 3—July 3, 1903.*

***Wills: Probate: Mental capacity: Undue influence: Evidence: Witnesses: Attorney and client: Admissibility of testimony of attorney who drafted will.***

1. **Evidence offered on application for probate of a will, stated in the opinion, considered, and *held* to show that the written instrument offered for probate did not emanate from the testator's mind, but was made by others and imposed on him.**
2. **Sec. 4076, Stats. 1898 (providing that an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course**

**of his professional employment), is nothing more than a re-enactment of the common law.**

**3. Under sec. 4076, Stats. 1898, while an attorney who draws a will will not be allowed, without the consent of the testator, while living, to testify to communications made to him concerning the will, or its contents, when the will is presented for probate after the testator's death, such attorney may testify as to directions given him by the testator, and such testimony is properly admitted in evidence in the proceeding.**

APPEAL from a judgment of the circuit court for Buffalo county: E. W. HELMS, Circuit Judge. *Reversed.*

This is an appeal from a judgment affirming the order and judgment of the county court admitting to probate what purports to have been the will of Thomas Downing, deceased, which reads as follows:

"I, Thomas Downing, of the town of Glencoe, county of Buffalo and state of Wisconsin, being of sound mind and memory, and mindful of the uncertainties of human life, do make, publish, and declare this my last will and testament in manner following, to wit:

"First. I desire and hereby authorize the early payment of all my just debts and the payment of the expenses of my last sickness and funeral without waiting for administration of my estate and estates.

"Second. I hereby give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, of every kind and description, in equal shares, parts and proportions, share and share alike, to Mrs. Mary Cashel, *Catharine T. Cashel, Mrs. Mary Gleason,* Miss Catharine M. Cashel, Miss Margaret E. Cashel, John A. Cashel, Miss Laura A. Cashel, *Miss Mae Cashel* and Miss Clara E. Cashel.

"Third. I hereby nominate and appoint *Miss Mae Cashel,* of Glencoe, Buffalo county, Wisconsin, to be executrix of this, my last will and testament, and I hereby authorize and empower her to sell at private sale all my personal property, and to sell at public sale on twenty-one (21) days' written notice, all my real estate, subject to the approval of the county court of said Buffalo county, Wisconsin, at any time within one year from and after my death, and to then divide and dis-

tribute the proceeds equally to those herein above named as my legatees.

"In witness whereof I have hereunto set my hand and seal this 3rd of March, A. D. 1901.

"JOS. LETTENBERGER. "THOMAS his × mark. DOWNING. [Seal.]
"M. ENGLISH.

"The above instrument, consisting of one sheet of paper, was, on the day of the date thereof, signed, published and declared by the said testator to be his last will and testament, in the presence of us who have signed our names at his request as witnesses; in his presence and in the presence of each other.

"JOS. LETTENBERGER, Arcadia, Wis.
"M. ENGLISH, Arcadia, Wis."

A trial being had, the court found, as matter of fact, in effect: (1) That Thomas Downing died March 3, 1901, at the age of 69 years; (2) of catarrhal pneumonia, which developed from a bad cold contracted five or six days before his death; (3) which gave him considerable pain, greatly reduced his strength, and induced him to refrain from talking; (4) that up to the time of his last sickness he was in good health; superintended the management of the Michael Cashel farm and managed his own business affairs; (5) that he first took to his bed Saturday night, March 2, 1901, and he made the will in question between four and six o'clock in the afternoon of March 3, 1901, and died about twenty minutes before nine o'clock on that night; (6) that the immediate cause of his death was physical obstruction of the air passages of the lungs by secretion, common in such diseases, which he was too weak to clear and which came on very suddenly after eight o'clock that night; (7) that he was a bachelor, and at the time of his death resided, and for more than thirty years next prior thereto had resided and made his home, with the family of his half-brother Michael Cashel; (8) that said Michael Cashel died October 1, 1891, and left, him surviving, his widow, Mary A. Cashel, and six children, viz., Catharine

M. Cashel, Margaret E. Cashel, John A. Cashel, Clara E. Cashel, Alice Cashel, and *Mary Cashel;* (9) that *Mary Cashel* is the person named as executrix in the will; (10) that at the time of his death the testator owned a farm and two lots in Arcadia, and a few notes and mortgages, all of the value of about $8,000; (11) that he left him surviving, as his sole heirs at law, one half-brother, *John L. Cashel,* one half-sister, *Mary Gleason,* one half-sister, *Catharine T. Cashel,* and the six children of Michael Cashel, named in finding No. 8; (12) that March 3, 1901, between four and six o'clock p. m. of that day, the testator duly made, executed, published, and declared the instrument in controversy as his last will and testament; (13) that the said instrument so made was the last will and testament of the said deceased; (14) that Thomas Downing was at the time said will was signed by him of sound mind, and had sufficient testamentary capacity to execute said will; (15) that no undue influence was exercised in the making or procuring of said instrument proposed as a will. And as conclusions of law the court found: (1) That the said Thomas Downing had at the time of making said will sufficient testamentary capacity to make a will; (2) that the instrument mentioned in finding No. 12 was Thomas Downing's last will and testament, duly executed, published, and declared as such; (3) that the order and judgment of the county court admitting said will to probate should be affirmed, and ordered judgment to be entered accordingly. From the judgment so entered, *Mrs. Mary Gleason, Catharine T. Cashel,* and *John L. Cashel,* mentioned in the eleventh finding of fact, bring this appeal.

For the appellants there was a brief by *Higbee & Bunge,* and oral argument by *E. C. Higbee.*

*S. G. Gilman,* for the respondent.

CASSODAY, C. J. The important question presented is whether the 12th, 13th, 14th, and 15th findings of fact are

supported by the evidence. It is undisputed that the testator was taken with a cold on Tuesday—five days before his death. On the following Thursday he hitched up his team and drove to Arcadia, and called on Dr. Palmer. Mrs. Mary A. Cashel doctored him for his cold, and he was around until Saturday evening, March 2, 1901, about supper time, when he went to bed. Dr. Lettenberger was called to treat him on the afternoon of that day. He found him suffering from catarrhal pneumonia, or capular bronchitis, and gave him hypodermic injections of sulphate of strychnine and small doses of brandy and milk. On Sunday morning, March 3, 1901, the testator sat up in bed and ate his breakfast of toast and coffee. Dr. Lettenberger saw him that morning between nine and ten o'clock, and remained with him about thirty minutes. Dr. Lettenberger, while at dinner, was again called by telephone to see him, and got there near two o'clock on that afternoon, and gave him an injection, the same as the day before, and gave him more that afternoon, and also gave him brandy and milk in the form of nourishment, and remained there with him until he died, about twenty minutes before nine o'clock on the evening of that day. Dr. Mewer, of Winona, was called and examined him for treatment about eight o'clock that evening. He became unconscious some twenty or thirty minutes before he died. It is very manifest that he failed very rapidly during the whole day, and especially during the afternoon and evening. It appears that, about half past two o'clock of that Sunday afternoon, Dr. Lettenberger asked Mrs. Mary Cashel and her son John A. "whether Mr. Downing had any papers to make or matters to straighten out—fix up—some words to that effect; that it was, perhaps, best for him to attend to it." The doctor then went back and told Mr. Downing that he thought it would be best for him—if he had any matters to straighten up or to fix up—perhaps it would be best for him to do so; that Downing then asked if he was dangerously ill, and was told that he was, and then,

after pausing a few minutes, he told the doctor that he supposed then that he had better make a will, and the doctor told him perhaps he had better do so. The doctor then told Mrs. Mary Cashel and her son John A. what he had said, and thereupon it was suggested that Richmond should be sent for, and he was sent for, and came, and drew the paper in question. The subscribing witness English testified that Richmond got there "after five, about five, about four o'clock—a little after four o'clock;" that they had to hunt up a lamp for him to write by. The young man, John A. Cashel, testified that it was about half past four o'clock when Richmond got there. Richmond testified to the effect that they came for him a few minutes after six in the evening, just as his supper was ready, and that it was somewhere between half past six and a quarter of seven o'clock in the evening when he got to Cashel's house. The court found that the will was executed between four and six o'clock in the evening. The doctor, who seems to be especially relied upon by the proponents, testified to the effect that after Richmond came, and had been there a few minutes, he said: "Now, Mr. Downing, how do you want this will made?" Downing made no response. Then it was suggested that perhaps he was timid, and so English and Barry withdrew, leaving Richmond and the doctor alone with the testator. Richmond then said: "Now, Mr. Downing, how do you want this will made? Do you want it equally divided, or do you want it in equal shares, or do you want to leave it to one party? Just state to me how you want this will made." But Downing made no response to any of such questions. Thereupon the doctor repeated the questions. It took ten or fifteen minutes to do so. Downing seemed to be very much absorbed in thought, but gave no response. Then he was asked: "Do you want it divided in equal shares among the following"—then the names were stated. The doctor could not state positively whether the question was, "If you want this divided in equal shares

among the Cashels, or members of the family." He thought Richmond gave the names, and, in order to get the initials, as he presumed, he went out for the names in full of the Cashel children and the widow, and so on, and then came back and read the names to Downing again, after "in equal shares among the following," and Downing assented by nodding his head after the reading of every name; that Richmond then asked whom he wanted for his executor, and, after pausing a moment, he said, *"Mae,"* and Richmond said, *"Mae Cashel?"* and he said, "Yes;" that after that the will was read over to him, and he was asked if that was his last will and testament, and he said, "Yes." With some apparent reluctance, the doctor was forced to admit that at no time, in the presence of Richmond, did Mr. Downing utter any other words than *"Mae"* and *"Yes."* Richmond testified to the effect that when he got there he asked Mr. Downing what he wanted of him, but got no response; that he appeared to be a very sick man, suffering much, in constant pain—constantly moving in bed. Part of the time, while in a reclining position or in a sitting posture, his eyes were closed, and his head dropped forward upon his breast most of the time. When the doctor talked to him, repeating the questions he had asked, or asking questions himself, and arousing—shaking him—he would open his eyes. After Barry and English left the room, Richmond made further effort to have Mr. Downing tell what he wanted—what business he wanted transacted or done—if anything; that he then took hold of his hand and asked him what he wanted done, what business he had to do, why he had sent for him, but got no response. The doctor then suggested that he wanted to make a will; that the business he wanted done was to make a will; that he (Richmond) then asked Downing if he wanted to make a will, but got no response; that the doctor then repeated the question to him a number of times, but that he made no response—at least, Richmond observed none; that Richmond asked him as to whom he

wanted to will his property, but he made no response; that Downing at no time gave him the name of any person to whom he desired to leave his property, or gave him any direction as to how he should draw the will. The doctor "said he wanted to will his property to Mrs. Cashel and her family;" and he had the doctor repeat that question to him several times, as to "whether he wanted to will his property to Mrs. Cashel and her family," and "he finally made a response by a motion of his head"—he nodded his head. When the will had been prepared, down to the clause appointing an executor, Richmond went into the bedroom and had the doctor "ask him who he wanted named in the will as executor, and he made a feeble attempt to speak a word which sounded like the word *"Mary"* or *"Mae,"* but that he did not speak any other word in his (Richmond's) hearing while he was there; that the widow gave him the names to be included in the will; that he asked Mr. Downing if he wanted to include Miss Kate Cashel, and he bowed his head and assented; that, on being asked several times if he wanted to include *Mrs. Gleason,* he finally nodded assent; that, after the writing of the will was completed, it was read over to him, and he was asked if it was his last will and testament, and, after that question was repeated to him several times, he assented, by a motion of the head, that it was, and the will was then executed.

Upon such evidence, we are called upon to determine whether the written instrument in controversy was properly admitted to probate as the last will and testament of Thomas Downing, deceased. Unlike most written instruments, a will, in this state, must be established in court by proof, as prescribed by the statute, before it goes into effect. Sec. 3788, Stats. 1898; *Jones v. Roberts,* 96 Wis. 431, 432, 70 N. W. 685, 71 N. W. 883. Probate of a will is essential to the passing of title to property. Sec. 2294, Stats. 1898. The measure of proof to establish a will, in case of contest, is suggested by the requisite mental capacity to make a will as ad-

judged by the courts. It was held in New York, many years ago:

"It is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were or should or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them." *Delafield v. Parrish,* 25 N. Y. 9, 29, followed in *Van Guysling v. Van Kuren,* 35 N. Y. 70, 74.

That language has been repeatedly approved by this court. *Holden v. Meadows,* 31 Wis. 294; *In re Blakely's Will,* 48 Wis. 300, 4 N. W. 337; *In re Lewis' Will,* 51 Wis. 104, 105, 7 N. W. 829; *McMaster v. Scriven,* 85 Wis. 169, 170, 55 N. W. 149; *In re Butler's Will,* 110 Wis. 70, 77, 78, 85 N. W. 678. Does the evidence show that the testator had such comprehension? Did he have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and hold them in his mind a sufficient length of time to perceive their obvious relations to each other, and form any rational judgment in relation to them? The doctor said that Mr. Downing wanted to will his property to Mrs. Cashel and her family, and yet the will includes two half-sisters, but leaves out the half-brother. He did name *"Mae"* for executrix, but there is not a word of evidence that he wanted to authorize the payment of debts and expenses without waiting for administration—much less, that he wanted to authorize the sale of all his personal property at private sale, and all his real estate at public sale, on twenty-one days' notice, within a year. It seems to be conclusively established that neither the provisions of the will, nor the substance of those provisions, ever emanated from the mind

of the testator. On the contrary, those provisions must have emanated from others, and, when stated to him or read to him, he, in his weakened and passive condition of mind, merely assented by nodding. The ravages of disease and the near approach of death had manifestly weakened his memory and destroyed his mental force, so as to make him incompetent to make a valid will, within the rules of law stated in the authorities cited. In other words, it appears from the evidence that the written instrument in question did not emanate from his mind, but was made by others and imposed upon him. The case is quite similar to *Mendenhall v. Tungate,* 95 Ky. 208, 24 S. W. 431.

2. But it is claimed that Richmond was an incompetent witness by reason of the statute which declares that "an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." Sec. 4076, Stats. 1898. This section is more narrow than the preceding section, precluding physicians from disclosing "any information . . . acquired in attending any patient." This section simply precludes an attorney from disclosing "a communication made by *his client to him,* or his advice given thereon, in the course of his professional employment." This language is too plain to require construction. It has recently been applied by this court in a case where an attorney who had received from his client authority, as an agent, to enter into a contract with a third person, and had acted thereon; and it was held that such attorney was not precluded by that section from testifying as to the giving of such authority, if it came in question. *Koeber v. Somers,* 108 Wis. 497, 503–511, 84 N. W. 991. The distinction is there pointed out between such communications and advice which fall outside of the attorney's professional employment, and transactions which come within the prohibitions of the section. It is there shown that by closing the mouth of the attorney as to

transactions or agreements where he is himself a party, or where he is in reality a mere agent or trustee, there would be presented an opportunity to perpetrate fraud and wrong, not only upon third parties, but also upon the attorney himself and the good name of the profession. That such is the danger is there illustrated by the citation of numerous authorities. What is said in that case is amplified in the more recent case of *Herman v. Schlesinger,* 114 Wis. 382, 392–394, 90 N. W. 460. Among other things, it is there said:

"We are unable to see how communications between an attorney and a person not his client, while conducting a business matter with such person for his client, whether he is acting professionally at the time or not, can be classed with those named in the statute. A communication made by a person to his attorney, to be and in fact communicated by him to another, is not privileged, because, in the very nature of things, it is not confidential in character. The very purpose thereof is to have the communication repeated to one who is under no obligation not to divulge it. That being the case, manifestly a reply to such a communication must be governed by the same rule, and so must, also, other communications between the attorney and the third person, in case of negotiations between the two."

There is no better reason for excluding the testimony of Richmond than there is for excluding the testimony of the attending physician under the previous section. And yet this court has held, in effect, that a subscribing witness to a will is necessarily expected to give testimony as to the execution of the same. *Alberti v. N. Y., L. E. & W. R. Co.* 118 N. Y. 77, 23 N. E. 35; *McMaster v. Scriven,* 85 Wis. 162, 55 N. W. 149. The doctor appears to have been present with Mr. Downing, and necessarily heard and witnessed all that took place between Downing and Richmond. But the question may be considerd on broader grounds. All the authorities, including the two recent adjudications from this court, agree that the section of the statute in question is nothing more than a re-enactment of the common law. *Koeber v. Somers,* 108

Wis. 504, 84 N. W. 991; *Hurlburt v. Hurlburt,* 128 N. Y. 424, 28 N. E. 651; *State ex rel. Hardy v. Gleason,* 19 Oreg. 162, 23 Pac. 817. It was held in England, many years ago:

"The reasons of the rule which protects from disclosure communications made in professional confidence apply in cases of conflict between the client or those claiming under him, and third persons, but do not apply in cases of testamentary disposition by the client as between different parties, all of whom claim under him. The privilege does not belong to the executors as against the next of kin, but, following the legal interest, is subject to the trust, and incident to which the legal interest is subject." *Russell v. Jackson,* 9 Hare, 387.

That case was followed in Massachusetts, where it was expressly held:

"The attorney who draws a will will not be allowed, without the consent of the testator while living, to testify to communications made to him concerning the will, or to its contents; but, when the will is presented for probate after the testator's death, the attorney may testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator." *Doherty v. O'Callaghan,* 157 Mass. 90, 93, 31 N. E. 726.

To the same effect, *Scott v. Harris,* 113 Ill. 447; *Winters v. Winters,* 102 Iowa, 53, 56, 71 N. W. 184; *Layman's Will,* 40 Minn. 371, 42 N. W. 286; *Coates v. Semper,* 82 Minn. 460, 85 N. W. 217. In this last case it was held, under a statute substantially like ours:

"An attorney at law who draws a will, and attends the person executing the same, to give advice, is not prohibited, on account of his relations as such counsel, from testifying concerning the facts connected with such execution, in a contest thereon."

The Iowa statute is quite similar to ours. In the case at bar the reasons for admitting Richmond's testimony are much stronger than in any of the cases cited. There is no

evidence that Mr. Downing was a client of Richmond's in the business transacted. There is no evidence that Downing made any communication to him, unless it was first filtered through the doctor, or some member of the Cashel family, or both. Every nod and affirmative utterance of Downing, made in the presence of Richmond, was also made in the presence of the doctor, or the doctor and others, and not in secret. Downing asked no advice of Richmond, and Richmond neither gave nor attempted to give him any advice—much less, "in the course of his professional employment." Although Richmond was an attorney at law, yet in drawing the written instrument in controversy he acted in the capacity of a mere scrivener, and his testimony was clearly admissible. *Hatton v. Robinson,* 14 Pick. 416; *Borum v. Fouts,* 15 Ind. 50; *Hanlon v. Doherty,* 109 Ind. 37, 9 N. E. 782. Thus it was held in one of the Indiana cases cited:

"When the terms of a contract have been agreed upon between the parties, and an attorney is afterwards employed, as a scrivener merely, to reduce the contract to writing, and no inquiry is made of him as to its legal effect, communications made to him while thus engaged will not be regarded as privileged."

We must hold that the testimony of Richmond was properly admitted as evidence in the case.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded, with directions to reverse the order and judgment of the county court, and for further proceedings according to law.

On September 29, 1903, it was ordered that the taxable costs of both parties be paid out of the estate.

## HAMLIN, Appellant, vs. FANTL, Respondent.

*June 4—July 3, 1903.*

*Slander: Evidence: Collateral circumstances: Instructions to jury: Intent in uttering slanderous words: Presumptions: Material error.*

1. In an action for slander it is error to hold that a previous controversy between plaintiff and defendant, of which the hearers of the slanderous words had no knowledge, may be offered in evidence and considered by the jury in deciding whether the words charged in the complaint, and conclusively proved to have been uttered, were used by defendant and understood by the hearers to charge merely that plaintiff had deprived defendant of certain lands, instead of having committed the crime of larceny, as would be the natural understanding of the words used.
2. In slander, the speaker of the slanderous words must be conclusively presumed to intend the meaning which his words will convey to the hearers in the light of all the circumstances known to them; the *gravamen* of the wrong is not the verbal assault upon the plaintiff, but the injury resulting to him from the effect upon others of the publication of the false defamatory charges.
3. In an action for slander it is error to instruct the jury that to warrant a verdict for plaintiff they must find that the slanderous words were not only understood but *intended* to charge the crime alleged.
4. Defendant, in an action for slander, testified that preliminarily to uttering the alleged slanderous words she asked plaintiff if he had received her notice, and was ready to give her her acre of land; to which plaintiff replied, using a vituperative epithet; whereupon defendant became very angry, told plaintiff that six months after her husband's death he had fenced in her land so she had ever since been deprived of it, and then said: "You are a stinker! You are a thief! You stole my land! You stole my money!" *Held*, that the unambiguous words "you stole my money" were in no wise qualified by the preceding words, but must have been understood as intending to charge something additional to, and distinct from, the act of depriving defendant of her land, which she characterized as stealing it.

**5. In actions for speaking words alleged to be slanderous, when the language is unambiguous, it is error to leave its construction to the jury.**

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action for slander, in which the complaint alleged, and the evidence proved substantially without contradiction, that defendant said to and of the plaintiff, in the presence and hearing of others: "You stinker! Stinker! You robber! You thief! You stole my land. You stole my money"—which, according to all the witnesses except defendant, was all that was said upon the occasion. The defendant testified that, in addition and as preliminary to these remarks, she asked plaintiff if he was ready to open the fence for her, so that she could get her acre of land; to which, on repetition, the plaintiff had answered with a vituperative epithet; at which she became angry, and called him a "stinker," and said that her husband had been dead several years, and that six months after his death plaintiff had fenced up her land and kept her off of it. Defendant was then permitted, over objection, to prove the existence of a controversy between her and plaintiff over a certain acre of land which each of them claimed, and which was held in possession by the plaintiff, and as to which she had some time before caused to be served some notice or demand to remove fences. She offered no evidence that these facts were in any wise known to most of the bystanders in whose presence the defamatory language was uttered. After a verdict in favor of the defendant, and the overruling of a motion for a new trial on the ground, amongst others, that the verdict was contrary to the evidence, judgment for the defendant was entered, from which the plaintiff appeals.

For the appellant there was a brief by *Weed & Van Doren*, and oral argument by *R. N. Van Doren.*

For the respondent the cause was submitted on the brief of *A. M. Spencer,* attorney, and *John Bottensek,* of counsel.

DODGE, J. The trial of this action was so pervaded by two errors that discussion of most of the specific assignments of error is rendered unprofitable, as they result from the view taken by the court upon the more general subjects. The first of these two dominant errors consists in holding that a previous controversy between plaintiff and defendant, of which most of the hearers of the slanderous words had no knowledge, might be offered in evidence and considered by the jury in deciding whether the words charged in the complaint and conclusively proved to have been uttered were used by the defendant and understood by the hearers to charge merely that plaintiff had deprived her of certain lands instead of having committed the crime of larceny, as would be the natural understanding of the declaration, "You stole my money." This view was not only impliedly declared by admitting evidence of such prior controversy, but also expressly by instructing the jury to consider that fact in deciding upon the meaning of the words used. That words naturally charging a crime may be so qualified by the *colloquium* or by reference to circumstances as to make apparent that they charge an act, not a crime, is unquestionable. *Robertson v. Edelstein,* 104 Wis. 440, 80 N. W. 724; *Egan v. Semrad,* 113 Wis. 84, 88 N. W. 906; *Carmichael v. Shiel,* 21 Ind. 66; Townshend, Sl. & Libel, § 134; 18 Am. & Eng. Ency. of Law (2d ed.) 987. But obviously their natural meaning cannot be so qualified to the understanding of the hearers unless the latter know of the collateral circumstances. To charge one with having murdered a person who is alive to the knowledge of all cannot be understood to charge the crime of murder, but, if any one of the hearers has no knowledge that such person is still alive, that fact can have no effect on the under-

standing he will acquire from the spoken words. It is therefore error to allow the jury to take such fact into consideration in deciding whether the words used conveyed to the mind of that hearer a charge of murder. Only by showing that such collateral circumstances were known to all the hearers can they constitute any defense. *Hankinson v. Bilby,* 16 M. & W. 442; *Smith v. Miles,* 15 Vt. 245; *Hayes v. Ball,* 72 N. Y. 418, 420; *Eaton v. White,* 2 Pin. 42; *Delaney v. Kaetel,* 81 Wis. 353, 51 N. W. 559; Townshend, Sl. & Libel, §§ 135, 136. In the present case the defendant made no attempt to prove that any of the persons who heard her words had any knowledge of the prior dispute with plaintiff of which she offered evidence. On the contrary, it appeared without controversy that all but one of them were wholly ignorant of any such circumstance. Hence the jury could not properly consider it.

The error above discussed was emphasized to the jury and rendered more likely to mislead them by the further direction that to warrant verdict for plaintiff they must find that the slanderous words were not only understood but *intended* to charge larceny. Of course, the meaning which the utterer intends to convey is not of itself material in an action of slander, except perhaps as to actual malice. The *gravamen* of that wrong is not the verbal assault upon the plaintiff, but the injury resulting to him from the effect upon others of the publication of false defamatory charges. That the words were intended by the utterer and understood by plaintiff in one sense is quite immaterial, if they naturally might be and were understood in another by the hearers. The effect upon them is what causes the plaintiff the damage recoverable in an action of slander, not the attitude of defendant. *Eaton v. White, supra; Delaney v. Kaetel,* 81 Wis. 356, 51 N. W. 559; *Hallam v. Post P. Co.* 55 Fed. 456; Townshend, Sl. & Libel, § 139. Defendant must be conclusively presumed to

foresee the natural and probable effect of his acts, and to intend the meaning which his words will convey to the hearers in the light of all the circumstances known to them.

2. We are persuaded that the court also erred in submitting to the jury at all the question of a nonlibelous significance for the words concededly uttered. The collateral circumstance of a previous controversy being eliminated for the reasons above stated, there only remained to qualify the words charged in the complaint, certain preliminary remarks to which defendant alone testifies, without making very certain that they were so uttered as to be heard by the witnesses. Assuming that they were, however, we have, upon the evidence most favorable to defendant, the following, as the entire colloquy: She approached plaintiff. Asked if he had received her notice, and was ready to open his fence, so she could get her acre of land. Upon plaintiff's responding, "Go on, you old bitch," she became angry, and told him her husband was dead seven years, and six months after his death he (plaintiff) fenced up the land so she had been deprived of it ever since. She then said: "You are a stinker! You are a thief! You stole my land. You stole my money." We may concede that without the last assertion there might have been no slander *per se* in these words. The assertion, "You stole my land," of course charges no crime. The charge, "You are a thief," does, if unqualified, but very possibly the immediate connection with the charge of stealing land might, to the ordinary understanding, indicate that such mere epithet was, as often, used loosely, as charging only that form of dishonesty. But how any of the preceding words could, to ordinary understanding, qualify the unambiguous declaration, "You stole my money," is not apparent. No one could suppose that the idea of deprivation of the acre of land merely was intended to be expressed by the charge of stealing money. That final word, whether from one speaking accurately or colloquially, excludes any such ambiguity as might lurk in a charge that

"You stole from me," "You robbed me." The subject might be further enlarged upon, but it is unnecessary. To us it seems clear beyond doubt that "You stole my money" must have been understood as intended to charge something additional to, and distinct from, the act of depriving defendant of her land, which she characterized as stealing it. That being so, the duty of the court was to so rule. When language is unambiguous, its construction should not be left to the jury. By that very act the court impliedly declares that in his opinion it is open to more than one interpretation, and intimates that they may properly do that which cannot but be injustice to one party or the other. *Snyder v. Andrews,* 6 Barb. 43, 47; *Van Akin v. Caler,* 48 Barb. 58; *Hunt v. Bennett,* 19 N. Y. 173; *Bourreseau v. Detroit E. J. Co.* 63 Mich. 425, 433, 30 N. W. 376; *Robertson v. Edelstein,* 104 Wis. 440, 443, 80 N. W. 724; Townshend, Sl. & Libel, § 286 *et seq.* The court correctly stated to the jury that the speaking of the words charged was proved beyond controversy. He should have gone further and instructed them that such words constituted slander, which plaintiff substantially requested him to do. He should further have set aside the verdict as contrary to the evidence, upon plaintiff's motion.

*By the Court.*—Judgment reversed, and cause remanded for a new trial.

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SIEGEL, Appellant, vs. TOWN OF LIBERTY, Respondent.

*June 4—July 3, 1903.*

***Town chairman: Authority to purchase road machine: Best evidence: Parol evidence.***

1. **The original of a certain petition to purchase a road machine was not produced upon the trial, and was not in the possession of either party. Appellant testified that he did not see the original, but saw what purported to be a copy filed in the town**

clerk's office, and offered to state the contents of the copy. The copy was equally accessible to both parties, but appellant took no steps to procure it, made no offer to show that he could not produce it in court, nor did it appear that his failure to produce the document was chargeable to the opposing party. *Held*, that the offer of parol evidence of the contents of the copy on file in the town clerk's office was properly excluded as incompetent, and because no proper foundation had been laid for secondary evidence.

2. Under sec. 1223, as amended by ch. 83, Laws of 1899 (authorizing a town chairman, on petition in writing by a majority of the taxpayers of road district, representing more than one half of the taxable property in said district, to purchase a road machine), a town chairman is *held* to have been authorized to purchase such machine on a petition in writing by eight of the fourteen taxpayers of the district, who together represented more than one half of the taxable property thereof, according to the last preceding assessment roll.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Plaintiff brought this action as a taxpayer of defendant town to set aside an illegal contract made by the chairman of the town, and to restrain the officers from collecting the taxes which were levied to pay the price of a certain road machine. The town of *Liberty* is one of the organized towns of Outagamie county, and is divided into twelve road districts. Plaintiff is a taxpayer of road district No. 9. On November 3, 1899, at a meeting of the town board, it adopted resolutions levying a direct annual tax on the taxable property in road districts Nos. 5, 6, and 9 of the town, to be levied and collected in three equal instalments, with interest, in the years 1900, 1901, and 1902, to pay for this road machine. H. B. Dexter was the town chairman, who entered into the contract with the Austin & Western Company for the purchase of one Western reversible road machine at $225. He asserts that he relied upon a petition by the taxpayers of the districts requesting such purchase and the action of the town board in levying the taxes for such purpose. The court found that

plaintiff failed in his proof to establish the material allegations of his complaint, and awarded judgment dismissing the complaint, and for costs, from which the plaintiff appeals.

For the appellant there were briefs by *Weed & Van Doren,* and oral argument by *R. N. Van Doren.*

For the respondent there were briefs by *A. M. Spencer,* and oral argument by *John Bottensek.*

The following opinion was filed June 18, 1903:

SIEBECKER, J. Appellant assigns error upon the court's ruling excluding testimony offered to prove the contents of a copy of the original petition requesting the purchase of the road machine, which the town chairman asserts is the basis of his authority to make the contract in question, under sec. 1223, Stats. 1898, as amended by ch. 83, Laws of 1899. The evidence tends to show that a petition was signed by taxpayers of these road districts requesting the chairman to purchase such a machine. The original of this petition was not produced upon the trial, and was not in the possession of either party. Plaintiff was sworn as a witness in his own behalf, and testified that he did not see this original petition, but saw what purported to be a copy filed in the town clerk's office, and offered to state the contents of this copy. Upon objection the court held such evidence inadmissible. It seems this copy was equally accessible to both parties. Appellant took no steps to procure it, nor did he offer to show that he could not produce it in court, nor did it appear that he was misled by the opposing party, which caused his failure to produce the document. Under these circumstances the evidence offered was properly excluded, for the reason that it was incompetent, nor was there a proper foundation laid for offering secondary evidence to prove the contents of the copy on file. *Sexsmith v. Jones,* 13 Wis. 565; 1 Greenleaf, Ev. §§ 82, 87.

It is further contended that the court erred in its finding

that appellant failed in his proof to establish that the petition did not contain the names of a majority of the taxpayers of each of said road districts, and that the persons who signed the petition do not represent more than one half of the taxable property in said districts according to the last preceding assessment roll. The evidence material to these questions fails to support the issues in favor of plaintiff's contention. This would necessarily require a finding as made by the trial court aside from the presumption that the proceedings taken by the town board and its chairman were based on authority, and that they proceeded regularly to purchase the road machine. The finding is, however, supported by proof, inferable from the evidence. The testimony tends to show that of the fourteen taxpayers of district No. 9, six, aside from Richard Jenkins and August Sewall, signed the petition, and that the signatures of these two parties were properly on the petition. It further appears that these eight persons represented more than one half of the taxable property in district No. 9, according to the last preceding assessment roll. This meets the requirements of the statute, and furnishes a proper basis for the levy of the tax and the purchase of the road machine by the chairman of the town. No proof was offered upon these issues as to districts Nos. 5 and 6. The finding and the judgment were proper.

*By the Court.*—Judgment affirmed.

A motion for a rehearing was denied July 3, 1903.

PRATT, Respondent, vs. HAWES and another, Appellants.

*June 5—July 3, 1903.*

*Patents and patent rights: Pleading: Defense: Evidence: Jurisdiction of state courts when infringement of patent is in question: Estoppel.*

1. In an action for the purchase price of a patent right to a machine, of the machine itself, and of certain appliances for the operation of the patented machine, defendants counterclaimed for fraud in representations that the patented machine was not an infringement on a prior patent that plaintiff had sold to other parties. *Held*, that it was error to exclude evidence that defendants purchased in reliance on the representations alleged, and that the patent purchased was in fact an infringement, although such patent actually covered the machine sold.
2. Where a state court has jurisdiction both of the parties, and of the subject-matter as set forth in the complaint, it cannot be ousted of such jurisdiction by the fact that, incidentally to his defense, the defendant claims the invalidity of a certain patent.
3. Where a defendant sets up a counterclaim in his answer, and demands judgment dismissing the complaint, and that the contract on which the action was founded be "canceled, rescinded and annulled," the plaintiff must by his reply plead any estoppel he desires to avail himself of upon the trial.
4. In an action for the price of a patent right and machine manufactured thereunder, the defendants alleged by way of defense, and also by way of counterclaim, that they were induced to purchase by false representations and fraud, and prayed a rescission of the contract. The plaintiff, without pleading such facts, offered in evidence, by way of estoppel, the fact that eight days after the execution of the contract for the patent the defendants sold all their right thereunder. *Held*, even if the evidence had been admitted without objection, or the facts properly pleaded, that it would only have been available to defeat the claim for rescission, and would not have prevented defendants from proving nonperformance, fraudulent representations and fraud on plaintiff's part, and damages sustained in consequence thereof.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

July 23, 1897, the plaintiff and defendants entered into a written agreement wherein and whereby the plaintiff, in consideration of $3,000 to be paid, sold and transferred to the defendants all his right, title, and interest in the affairs and business of the Pratt & Brown Manufacturing Company; also all his right, title, and interest for the United States in and to a machine or machines known as the "Improved Wire and Slat Fabric Weaving Machine;" also all his right, title, and interest for the United States in and to a machine about to be constructed for the manufacture of "knockdown" barrels and boxes, and known as the "barrel machine;" also all his right, title, and interest in and to all the pulleys, belts, shafting, and other machinery then used in the factory of the Pratt & Brown Manufacturing Company in Lansing, Michigan, for the purpose of operating said improved wire and slat fabric weaving machine, except power engine therein, which the plaintiff thereby reserved to himself. Upon the delivery of written assignments of letters patent on said improved wire and slat fabric weaving machine to be issued out of the Patent Office, said letters patent to be delivered by the plaintiff to the defendants and one Edwin B. Brown, of Chicago, then the sum of $3,000 shall be paid to the plaintiff by the defendants in such manner as the plaintiff shall direct. And the plaintiff therein further agreed that upon signing such agreement, and within seven days thereafter, he would proceed to Appleton and assist in setting up and constructing said machine, giving two weeks of his time free of charge therefor—his reasonable expenses during that time to be paid by the defendants; that if he rendered further services he was to receive therefor from the defendants $3 per day; that, in consideration of the premises, he therein agreed immediately to turn over to the defendants and said Edwin B. Brown the existing plans and drawings of the barrel machine, to assist the defendants to the best of his ingenuity and ability in the construction of said barrel machine, and to carry out

his plan for the improvement and construction of the same in all respects, free of charge, and to give the defendants and Edwin B. Brown the first option to purchase any improvements he might thereafter make on either machine or any new machine. And the defendants therein and thereby agreed that, on the delivery to them of the letters patent aforesaid, they would pay to the plaintiff the sum of $3,000, in such manner as he might specify. August 26, 1898, the plaintiff commenced this action to recover the $3,000 mentioned in the contract, alleging full performance of the contract on his part, and, among other things, that he procured the letters patent mentioned in the contract, March 8, 1898, and tendered an assignment thereof to the defendants and Edwin B. Brown, April 21, 1898; that the defendants then and there refused to receive the same, and that he kept the tender good. Defendants answered by way of admissions, denials, and counter allegations, and, among other things, alleged as a defense, in effect, that the plaintiff induced and procured the defendants to make and sign the said agreement by falsely, fraudulently, and deceitfully representing to them that he was the sole inventor of the improved wire and slat fabric weaving machine mentioned; that he had applied for letters patent thereon; that said machine did not and could not conflict with or infringe upon any former machine patented, especially a machine for the like purpose which had theretofore been patented, and sold to a party or parties at Dayton, Ohio—being patent No. 514,496; that the improved wire and slat fabric weaving machine mentioned in the agreement could make the same goods as the Dayton machine, without infringement thereof or liability therefor; that the Pratt & Brown Manufacturing Company of Lansing had already an established and paying business at Lansing, but needed more capital; that he had also invented the machine for making knockdown barrels mentioned; that, relying upon and believing such representations to be true, the defendants

made and entered into the contract upon which this action was brought; that at the time of making such false, fraudulent, and deceitful representations, the plaintiff had not applied for such patent; that he did thereafter, and obtained letters patent No. 600,269, March 8, 1898, but that said patent was not a patent on the machine mentioned in the agreement; that such patent was an infringement on patent No. 514,496, granted by the Patent Office February 3, 1894, and afterwards, and before the making of said agreement, sold to a party or parties at Dayton, Ohio; that the plaintiff, at the time of making such false, fraudulent, and deceitful representations, well knew that said machine was an infringement of said former invention, and that he had no right, in law or otherwise, to manufacture boxes or knockdown barrels; that letters patent No. 600,269 were not for any new and original invention, as plaintiff well knew at the time of such representations, and that such machine is of little or no value, and that the plaintiff had entirely failed to perform the contract on his part, and in consequence thereof the defendants had suffered a large amount of damages, to wit, the sum of $1,400. The answer then, by way of counterclaim, reiterates and realleges such false, fraudulent, and deceitful representations in procuring the defendants to make and sign such agreement, and alleges and claims $1,400 damages in consequence thereof. The plaintiff replied, putting in issue the allegations of the counterclaim. At the close of the trial, the court directed a verdict in favor of the plaintiff for $3,000, and interest from April 26, 1898, amounting in all to $3,381. From the judgment entered thereon in favor of the plaintiff for the amount stated and costs, the defendants bring this appeal.

For the appellants there were briefs by *A. M. Spencer* and *John Bottensek,* and oral argument by *Mr. Bottensek.*

For the respondent there was a brief by *L. B. Gardner,* at-

torney, and *Buell & Hanks,* of counsel, and oral argument by *Mr. Gardner* and *Mr. C. E. Buell.*

CASSODAY, C. J. Most of the errors assigned relate to the exclusion of evidence.

The plaintiff was sworn and examined as a witness in his own behalf, and gave testimony tending to prove a compliance with the terms of the contract, and, among other things, that he was the inventor of the improved wire and slat fabric weaving machine mentioned in the contract, and that he had procured the patent therefor—No. 600,269—mentioned in the complaint. On cross-examination he testified to the effect that the negotiations relative to that contract had been to some extent carried on by and between the defendant *McNamee* and Mr. Daniel Brown (who owned a half interest in the machine and plant and patent), and that he and Brown acted together in making sale to defendants, and that he met the defendant *McNamee* at Brown's office in Chicago the day on which the contract was signed; that he had no correspondence with the defendants prior to that date; that he did not know as he could state fully the conversation he had with *McNamee* at that time. He was then asked to state such conversation as near as he could recollect it. On objection being made, the same was excluded. He then testified, without objection, to the effect that the improved wire and slat fabric weaving machine mentioned in the contract, although not patented until afterwards, was in existence at Lansing when the contract was made, and was afterwards shipped by him from Lansing to Appleton, as being in compliance with the contract, and the one on which a patent had been applied for, and the one mentioned in patent No. 600,269. He was then asked whether the machine so sent from Lansing complied in all respects with the machine designated in patent No. 600,269, under claims from one to seven inclusive. On ob-

jection being made, the same was excluded. There were but seven claims in the patent. He was then asked whether the machine so shipped from Lansing was the same machine in all its details and parts as covered by the specifications and claims in that patent. On objection being made, the same was excluded. It appears, and is undisputed, that the plaintiff was the inventor, or one of the inventors, of the Dayton machine covered by patent No. 514,496, granted to him and others February 3, 1894, as mentioned in the answer.

After the plaintiff had rested, the defendants gave evidence as to their negotiations with Brown, who, with the plaintiff, owned the new machine and plant and patent, prior to signing the contract; and, among other things, to the effect that the defendants had learned that another concern at Dayton, Ohio, were making similar goods; that they had previously purchased a machine from the plaintiff for the manufacture of such goods; that Brown had assured them that there was nothing in the new machine that conflicted in any way with the old patent; that the old machine could not make such goods as the new machine would make; that the Dayton parties were working more on another class of goods; that there was no chance for any trouble to come up in the line of infringements or lawsuits, and that it was all clear and open; that the machine they were working on at Lansing was nothing like the former machine, at all, in any way, shape, or manner; that the matter from Dayton was merely a bluff, and there was nothing in it; that the machine would show there was nothing to conflict; that just before the contract was signed, and on the same day, the plaintiff stated to them, in effect, that the machine he had at Lansing was made entirely different, and could manufacture goods that the former machine could not make, and that it did not conflict in any shape or manner; that he would make the alleged claims of conflict with the former machine satisfactory. The defendant *McNamee,* who gave such testimony, was then asked:

"In making this agreement on your part, on what did you rely?" On being excluded, he was then asked: "What was the inducement for you to enter into this contract with Pratt?" That was excluded. Several questions were excluded as to the operation of the knockdown barrel machine constructed by the plaintiff at Appleton. The defendants called a witness who testified to the effect that he was a patent lawyer and expert in construing specifications and claims of patents for inventions and in determining questions of the infringement of such patents. He was then requested to state what education and experience he had had tending to qualify himself to testify as an expert on questions of the infringement of such patents, and upon different articles made under letters patent. The court rejected such testimony on the ground that it was immaterial, for the reason that the proofs offered by the plaintiff failed to show either a warranty or fraud in obtaining the contract, and therefore the question as to what work the machines were capable of doing, or as to whether the later machine was an infringement on the former one, was immaterial, and so the same was excluded on that ground. Thereupon counsel for the plaintiff withdrew his objection and the witness stated facts tending to show him qualified to testify as an expert. The witness was then allowed to testify to the effect that he had examined letters patent No. 514,496, and also No. 600,269, and had examined both of the machines therein described, including the Lansing machine then present in court, and which was then identified as such, and was then asked to state whether or not the construction of that machine was shown and described in patent No. 600,269. On objection being made, the same was excluded. Thereupon the two following questions were put to the same witness, and they were both excluded: "I wish you would look at No. 514,496. Are the twister heads on this machine now here covered by letters patent 514,496? Are the twister heads on the Lansing machine here in court sim-

ilar to these—the same form of twister heads described in the patent No. 514,496?" He was then allowed to testify to the effect that the twister heads on the Lansing machine then in court were not *the same twister heads* as those described in and covered by letters patent 600,269; that they were different. The court thereupon made the following statement:

"I think, after examining the letters patent—I think it appears, *prima facie,* that the latters patent No. 600,269 are a substantial compliance with the terms of the contract. There may be modifications and variations in this machine; there may be a great many—some have already been pointed out—but the letters patent themselves are what is described in the contract for an improved slat machine, etc.; so I do not think there is any question about the fact that the letters patent do substantially comply with the terms of that agreement; so that question is out of the case. And this rules out all expert testimony."

Thereupon the court excluded the following question put to the same expert witness:

"Please to compare the construction of the invention covered by these two patents, and also consider the claims of patent 514,496, and state whether the construction of patent number 600,269 is an infringement upon the claims of patent 514,496."

The unprinted record discloses the exclusion of numerous other offers of testimony on the part of the defendants. Some of such rulings may be justified. But it is obvious that the defendants were precluded from proving the defense alleged in the answer. The defense so alleged is to the effect that the defendants were induced to sign the contract by false and fraudulent representations as to existing facts, and especially the representation that the Lansing machine was not an infringement of the prior patent covering the Dayton machine. The plaintiff claimed to be the inventor of both machines. He had previously sold all his right to the Dayton invention to parties living at that place. He would naturally be supposed to know whether the Lansing machine infringed the

prior patent covering the Dayton machine. The defendants had the clear right to prove that such representations were made, that they were induced to sign the contract because they relied upon such statements and believed them to be true, and that such representations were false, and they had sustained damage by reason thereof.

Some of the rulings of the court seem to have been on the theory that if patent No. 600,269 actually covered the Lansing machine, then the plaintiff had substantially complied with the terms of his contract, and that it was immaterial whether it was procured by fraud or not; and that the question whether that machine was an infringement of patent No. 514,496 could not be determined in this action. The law is to the contrary. The supreme court of the United States has recently held:

"When a state court has jurisdiction both of the parties and the subject-matter as set forth in the declaration, it cannot be ousted of such jurisdiction by the fact that, incidentally to his defense, the defendant claims the invalidity of a certain patent." *Pratt v. Paris G. L. & C. Co.* 168 U. S. 255, 260, 261, 18 Sup. Ct. 62.

It is there said by the court:

"We are referred to but one case directly in point which favors plaintiff's contention—*Elmer v. Pennel,* 40 Me. 430—in which, in a suit upon a note given for a patent right, proof that the patent was void as an infringement upon a prior one was held not to be admissible without that fact having been determined by a court of competent jurisdiction. There is, however, an overwhelming weight of authority to the contrary."

The court then cited numerous cases from Massachusetts, New Hampshire, Connecticut, New York, Pennsylvania, Indiana, Wisconsin, Illinois, and Missouri, and said:

"In all these states the principle seems well established that any defense which goes to the validity of the patent is available in the state courts. In these cases the validity of the patent was attacked upon different grounds, but we per-

ceive no distinction in the principle involved. The patent may be void because the invention was well-known before, or because it is useless or immoral, or because it is an infringement upon other prior patents, and it is no objection to the jurisdiction of the state court that the question of validity may involve the examination of conflicting patents or the testimony of experts. It is the fact of its invalidity, and not the reasons for it, that is material. The cases are so numerous and uniform that a bare reference to them is all that is necessary."

Among the cases there cited from this court are *Page v. Dickerson,* 28 Wis. 694, and *Rice v. Garnhart,* 34 Wis. 453. To these may be added *Rowe v. Blanchard,* 18 Wis. 441; *Croninger v. Paige,* 48 Wis. 229, 4 N. W. 106; *Fuller & J. Mfg. Co. v. Bartlett,* 68 Wis. 73, 31 N. W. 747; *Herman v. Gray,* 79 Wis. 182, 48 N. W. 113; *Valley I. W. Mfg. Co. v. Goodrick,* 103 Wis. 436, 78 N. W. 1096. In the earliest of these cases, in an action on a note given for the assignment of a right under a patent, it was held by this court that the maker of the note might defend by showing that the invention was practically useless, and hence that there was a want of consideration. In another of the cases cited it was held that the state court has "jurisdiction of actions where the contract of sale of a patent right is sought to be rescinded because procured by fraudulent representations of the vendor as to the value and usefulness of such right." *Page v. Dickerson, supra.* So, in an action brought in a state court to recover the contract price of a patent right, it was held by this court that, for the purpose of showing a want or failure of consideration, the defendant might prove that the patent was void because the patentee was not the first inventor of the patented article. *Rice v. Garnhart, supra.* In another it was held, in a suit by the vendor for the purchase price of a patent, that the vendee might defend on the ground that the article sold was in fact an infringement of a patent. *Croninger v. Paige, supra.* The other cases in this court cited have

more or less bearing upon the question. See, also, *Excelsior W. P. Co. v. Pacific B. Co.* 185 U. S. 282, 286, 22 Sup. Ct. 681; *McMullen v. Bowers,* 102 Fed. 494. But it is unnecessary to multiply adjudications from state courts, since the question is so firmly established by the highest authority on federal questions.

2. Counsel claim that the defendants are estopped from making such defense, or recovering on their counterclaim, for the reason that on July 31, 1897—eight days after the execution of the contract—the defendants sold all the property and rights they had secured from the plaintiff, by virtue of the contract, to the Appleton Ventilated Wooden-Ware Company. There are two reasons why this contention cannot prevail. The general rule is that an estoppel must be pleaded in order to enable a party to avail himself of it upon the trial. *Warder v. Baldwin,* 51 Wis. 450, 459, 8 N. W. 257; *Borkenhagen v. Paschen,* 72 Wis. 272, 39 N. W. 774; *Bank of Antigo v. Ryan,* 105 Wis. 37, 80 N. W. 440. It is not a case where there was no opportunity to plead the facts constituting an estoppel. The answer of the defendants contains a counterclaim covering the whole question of false representations and frauds, and demands judgment dismissing the complaint, and that the "contract be canceled, rescinded, and annulled." The only reply is a denial of each and every allegation therein contained, except as specifically admitted, qualified, or explained in the complaint. The record discloses the fact that the evidence of such sale and transfer by the defendants was admitted, against objection. *Evens & Howard F. B. Co. v. Hadfield,* 93 Wis. 665, 68 N. W. 468. Besides, had it been admitted without objection, or been properly pleaded, it would only have been available to defeat the claim for the rescission of the contract. It could not have prevented the defendants from proving nonperformance of the contract on the part of the plaintiff, nor that the defendants were induced to sign the contract by the false and fraudulent representa-

tions on the part of the plaintiff, and had sustained damages in consequence thereof. We are forced to the conclusion that there was a mistrial in this case.

*By the Court.*—Judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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ZIMMER, Respondent, vs. FOX RIVER VALLEY ELECTRIC RAILWAY COMPANY, Appellant.

*June 5—July 3, 1903.*

*Street railways: Injuries to passengers: Riding on platform: Negligence: Contributory negligence: Special verdict: Appeal and error: Instructions to jury.*

1. In an action against a street railway to recover for an injury sustained in being thrown from the platform on which plaintiff was riding, the evidence, stated in the opinion, considered and *held* to sustain findings of defendant's negligence, and to relieve plaintiff of the charge of contributory negligence.
2. The special verdict prescribed by sec. 2858, Stats. 1898, is not designed to elicit from the jury a mere abstract of the evidence, and hence error cannot be assigned to a refusal to submit questions, the determination of which would settle nothing except the existence or non-existence of certain items of evidence.
3. In submitting a special verdict to the jury, it is not error to refuse to submit requested questions, where such questions are covered fully, or in substance, by instructions given on the questions actually submitted.
4. In an action for personal injuries, happening through being thrown from the platform of a street car on which plaintiff was riding, it is error to instruct the jury, in substance, that if they found that the car was crowded, and that plaintiff was required to stand upon the platform, he was entitled to just as much care for his safety as though the car was not crowded, and in riding on the platform he assumed the inconvenience resulting from the crowded condition, but *did not assume any increased risk.*
5. In such case, an instruction to the jury on the question of proximate cause, in substance, that in order to answer the question

**in the affirmative, they must find from the testimony that the circumstances and conditions were such that defendant ought to have known that its conduct might produce the injury which plaintiff sustained, or to anybody else standing in the same relation he did, considered, and *held* to be vague, uncertain, and calculated to confuse the jury.**

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to recover damages for injury sustained by falling from a street car while riding thereon as a passenger for hire. The defendant answered by way of admissions, denials, and counter allegations. At the close of the trial the court found, by consent of counsel, that the plaintiff was injured by falling from a street car at the time and place described in the complaint, and the jury returned a special verdict to the effect (2) that such injury to the plaintiff was caused by the negligence of the defendant; (3) that such negligence consisted—"caused by the rapid motion of the car around a curve at the point where the accident occurred;" (4) that the negligence of the defendant was the proximate cause of the plaintiff's injury; (5) that there was no want of ordinary care on the part of the plaintiff at the time the accident happened which contributed to the injury he received; (6) that the amount of damages sustained by the plaintiff by reason of the injury so received was $800. From the judgment upon such verdict in favor of the plaintiff for the amount stated, the defendant brings this appeal.

*J. C. Kerwin,* for the appellant.

For the respondent there was a brief by *Eaton & Eaton,* attorneys, and *H. I. Weed,* of counsel, and oral argument by *L. K. Eaton.*

CASSODAY, C. J. It appears that the plaintiff got onto the defendant's street car while standing on Main street, opposite the Menasha Bank, in the city of Menasha, August 6, 1899. The track at that point ran in a northeasterly and

southwesterly direction. At a point 214 feet northeast of the place where the plaintiff got onto the car the track began to turn, and finally went directly east. While rounding the curve, the plaintiff fell off the car and was injured.

1. It is claimed that the case should have been taken from the jury for the reason that the evidence is insufficient to sustain a finding of negligence on the part of the defendant. Negligence is not a conclusion to be testified to by witnesses, but an inference to be deduced from the facts and circumstances disclosed by the evidence. *Kaples v. Orth,* 61 Wis. 533, 21 N. W. 633. Negligence is "an inference to be deduced from the facts and circumstances disclosed by the evidence. . . . When such facts and circumstances, though undisputed, are ambiguous, and of such a nature that reasonable men, unaffected by bias or prejudice, may disagree as to the inference or conclusion to be drawn from them, then the case should be submitted to the jury." *Id.; McDougall v. Ashland S. F. Co.* 97 Wis. 392, 73 N. W. 327. Of course, in support of the verdict in favor of the plaintiff, on this appeal, we are required to consider the evidence in his behalf in the most favorable light it will legitimately bear. *Nelson v. Shaw,* 102 Wis. 277, 78 N. W. 417; *Renne v. U. S. Leather Co.* 107 Wis. 320, 83 N. W. 473. In the case at bar the plaintiff testified to the effect that when he got onto the car it was full; that he at first stood on the lower step, and then on the upper step or platform, and held himself to the iron railing—the brass railing—on the back end, at the window, close to the door; that the car was overcrowded; that when the conductor came around and collected fare he put his hand in his side pocket and took out the money to pay his fare; that when he got at the curve the twist and fast driving around the curve threw him off and injured him; that his pocketbook was not fastened, and a part of the contents went on the ground and a part on the car. Other witnesses testified in his behalf, among other things, to the effect that the plaintiff

fell off the rear platform, head first, just as the car got past the curve; and the car was running perhaps five miles an hour, and as it came to this curve it gave a twist, and threw him off—he fell off; just before falling he had hold of the railing at the side or end of the car; that others were standing on the platform; that the car was overloaded—that is, people could not get off from the platform into the car; that the car went onto the curve just as it came down the main track; that the curve was sharp, and the car naturally gave a twist. Another witness, who was at or near the curve at the time, testified to the effect that as the car struck the curve it gave a very sudden lurch, and turned very sharply; the back end of the car came in view very suddenly; that the car came about the usual speed for it on Main street; that he did not notice any slackage at all; that it seemed to turn unusually quick; that he saw the plaintiff standing on the rear platform while coming, and afterwards saw him on the ground, but did not see him fall. Another witness on behalf of the plaintiff gave testimony of a similar import; and, among other things, to the effect that the car was crowded; that it came down on the main line from the bank without any perceptible stop or slackening of speed as it struck the curve; that it made an unusually sudden turn at the curve.

Viewing such testimony in the most favorable light for the plaintiff it will legitimately bear, and we are unable to say, as a matter of law, that the finding of the jury that the injury to the plaintiff was caused by the negligence of the defendant is not sustained by evidence. The same is true as to finding of the jury as to the absence of any contributory negligence on the part of the plaintiff.

2. Error is assigned because the court did not submit to the jury the thirteen questions requested by the defendant. Such questions were mostly of an evidentiary character, the determination of which would settle nothing except the existence or nonexistence of certain items of evidence. This

court has repeatedly held that the special verdict prescribed by the statute was never designed to elicit from the jury a mere abstract of the evidence. Sec. 2858, Stats. 1898; *Heddles v. C. & N. W. R. Co.* 74 Wis. 258, 42 N. W. 237; *Montreal R. L. Co. v. Mihills,* 80 Wis. 551, 50 N. W. 507; *Mauch v. Hartford,* 112 Wis. 54–58, 87 N. W. 816. These adjudications, and many others which might be cited, justified the court in refusing to submit most of such questions.

But counsel insists that the court improperly refused to submit certain "particular physical facts directly put in issue by the pleadings," and relies in support of such contention upon *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714. In that case the only evidence in support of the verdict was the testimony of the plaintiff himself, and that was contradictory and in direct conflict with the testimony of a large number of other witnesses, and the determination of the physical facts put in issue by the pleadings was essential to determine the truth of the transaction; and so it was in effect held that, under the circumstances of the case, it was an abuse of the discretion vested in the trial court not to submit such questions to the jury. See pages 355, 356, 362, 101 Wis., pages 715, 717, 77 N. W. In following that case it has since been said by this court:

"The form of the questions must rest largely in the discretion of the trial court, and, as in other cases of discretionary action, the ruling of the court below will not be reversed, save for abuse of such discretion." *Ward v. C., M. & St. P. R. Co.* 102 Wis. 221, 78 N. W. 442. See, also, *Baxter v. C. & N. W. R. Co.* 104 Wis. 315, 80 N. W. 644; *Sladky v. Marinette L. Co.* 107 Wis. 257, 83 N. W. 514.

Particular objection is made because the court did not in form, as requested, submit to the jury the question whether the car was going at an unreasonable and dangerous rate of speed when the plaintiff fell off. The question was substantially covered, and almost in the language requested, in charging the jury under the second question submitted, and it was

necessarily determined by the jury in answering that question. The charge in that respect is unobjectionable. Counsel insists that the court should have submitted to the jury the question requested as to whether the defendant ought to have foreseen, in the light of the attending circumstances, that an injury to passengers would be the natural and probable result of operating the car as it was operated when the plaintiff fell off. The question was fully covered by the charge under the fourth question submitted. We must hold that the special verdict covers all the facts put in issue by the pleadings, and that there was no error in refusing to submit questions to the jury.

3. Error is assigned because the court, at the request of the plaintiff, charged the jury on the question of contributory negligence as follows:

"If you should find from the evidence that this car was crowded, and that the plaintiff was required to stand upon the platform, he was entitled to just as much care for his safety as though the car was not crowded, and in riding upon the platform he assumed the inconvenience resulting from the crowded condition, but *did not assume any increased risk.*"

This is sought to be justified by what was said by this court in *Ward v. C., M. & St. P. R. Co.* 102 Wis. 220, 221, 78 N. W. 442. But it will be observed that the refusal to give the instruction there requested was justified on the sole ground that the instruction was capable of being construed as stating "that a passenger on an excursion train is not entitled, *as a matter of law,* to expect just as much care to be exercised for his safety as a passenger upon a regular train." True, the court then said:

"Doubtless a passenger, when he rides upon a crowded train, assumes the inconveniences resulting from its crowded condition, but he cannot properly be said *to assume any increased risk;* nor can the company be held to any less degree of care from the mere fact that the train is crowded, or the fact that it is an excursion train, and not a regular train."

The trial court was manifestly induced to give the instruction so requested by reason of the statement in that opinion to the effect that a passenger on an "excursion train" or a "crowded train" "cannot properly be said to assume any increased risk"—meaning thereby to assume any increased risk "as matter of law," as stated in the previous sentence—but the expression was unfortunate. Undoubtedly, a passenger upon a crowded car is required to exercise that degree of care which ordinarily prudent persons are accustomed to exercise under like circumstances. 1 Thompson, Neg. § 2. Undoubtedly, the law requires a higher degree of care, attention, and diligence in some situations than in others. Id. The standard of care is what a reasonable and prudent man would ordinarily do under the circumstances of the particular case. Id. This court has held that "the test of negligence in such a case is the presence or absence of that degree of care which ordinarily prudent persons are accustomed to observe about the same or similar affairs, in similar circumstances." *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Nass v. Schulz,* 105 Wis. 146, 81 N. W. 133. We must hold that the giving of the instruction quoted was reversible error.

4. In charging the jury upon the question of proximate cause, they were told that, in order to answer the question in the affirmative, they must "find from the testimony that the circumstances and conditions were such that the defendant ought to have known that its conduct might produce the injury which the plaintiff sustained, or to anybody else standing in the same relation he did." Counsel contends that this was vague, uncertain, and calculated to confuse the jury. We must concur in this contention. The rule on the subject has been considered so often as not to require repetition. *Sheridan v. Bigelow,* 93 Wis. 426, 67 N. W. 732; *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348, 357, 71 N. W. 372; *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735; *McFarlane v. Sullivan,* 99 Wis. 361, 364, 74 N. W.

559, 75 N. W. 71; *Dehsoy v. Milwaukee E. R. & L. Co.* 110 Wis. 415, 85 N. W. 973.

Other questions raised are not regarded of sufficient consequence to call for discussion.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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SECOR, Plaintiff in error, vs. THE STATE, Defendant in error.

*June 5—July 3, 1903.*

*Criminal law and practice: Embezzlement: Pleading: Information: Amendment: Waiver:* Corpus delicti: *Evidence: Right to bill of particulars: Admissibility of books of account kept by subordinates of accused: Nature of property embezzled: "Money": Instructions to jury: Preliminary remarks: Reasonable doubt: Prejudicial error: Court and jury: Coercion of jury: Amendment of verdict: Time for taking exceptions to requested instructions: Statutes.*

1. Timely exceptions must be taken to the rulings of the court in criminal as well as civil cases, or the objection will be deemed waived.
2. An information filed in a criminal prosecution was amendable at common law, and the mere fact that its use has been extended, so as to include felonies, does not take away the power of the court to allow an amendment in any criminal prosecution, since the rules applicable to indictments are not enforced against amendments to informations.
3. Sec. 4703, Stats. 1898, allows amendments in criminal prosecutions in case of variance between the statement in the indictment or information and the proof "in the name or description of any person, place, or premises, or of any thing, writing or record, or of the ownership of any property described" therein. *Held*, that it was not error to permit an information for embezzlement to be amended, after the defense has entered upon its case, by striking therefrom the allegation that the money embezzled was "good and lawful money of the United States," where there was no exact proof of the character of the money alleged to have been embezzled.

4. In a prosecution for embezzlement, the evidence, stated in the opinion, examined, and *held* sufficient to establish the *corpus delicti*.
5. Under sec. 4667, Stats. 1898 (providing that, in any prosecution for embezzlement, it shall be sufficient to allege generally in the indictment or information "an embezzlement of money to a certain amount or of property to a certain value, without specifying any particulars of any such embezzlement, and on the trial evidence may be given of any such embezzlement within six months after the time stated in the indictment or information; and it shall be sufficient to maintain the charge . . . and shall not be deemed a variance if it shall be proved that any money or property of whatever amount, was fraudulently embezzled by the defendant within the said period of six months"), the *corpus delicti* is sufficiently proved by evidence of a general shortage in the accused's accounts, without proving the conversion of a specific item.
6. In a prosecution for embezzlement, the refusal to grant the accused's request for a bill of particulars is not error, when he has been advised by the state's evidence at the preliminary examination of the exact items of the charge against him.
7. In a prosecution for embezzlement it appeared that the accused was the bookkeeper of the complaining corporation, and was charged with the general supervision of all the books kept in the business of its office, and that part of the books offered in evidence, for the keeping of which the accused was responsible, contained entries, not made by him, but by subordinate employees. *Held*, that it being the accused's duty to see that such books were properly kept, they were admissible in evidence; not as conclusive evidence, but as books kept under accused's supervision and general control, of whose correctness he should, in the performance of his duty, have knowledge.
8. In a prosecution for embezzlement, the evidence showed that checks, drafts, and express orders had been received by accused as well as money; that all the receipts were entered on the books, either by the accused or his subordinates, as money, and that in a number of confessions made by the accused he spoke of his embezzlement as an embezzlement of money. *Held*, that the proof was ample to show that the amount taken was money.
9. In a prosecution for embezzlement from a corporation, remarks were made by the court, introductory to the instructions to the jury, in substance, that the offense charged was a grave one, involving the betrayal and breach of trust reposed in a trusted employee; that the entire property of corporations

must of necessity be intrusted to, and its business carried on by, its employees; that it is a matter of great importance that all employees who are intrusted with their employer's money or property, should faithfully care for and honestly account for whatever is committed to their care, custody, or possession, and that persons can protect their property from strangers, but not from trusted employees; that the case was important to defendant because it involved his personal liberty and reputation and character; that it was important to the state because it is charged with the grave duty of apprehending and punishing criminal offenses; that therefore the court asked the jury's careful and close attention to the instructions it should give, by which they were to be guided in considering the evidence and arriving at their verdict. *Held*, that such remarks were not erroneous as amounting to an argument in favor of the state, but were entirely proper for the purpose of impressing on the jury the gravity of the crime and the importance both to the state and the defendant of a careful consideration of the evidence and the instructions.

10. In a prosecution for embezzlement the court gave, in substance, the following instruction on the subject of reasonable doubt: By reasonable doubt is meant a doubt of guilt for which a reason can be given, arising out of the evidence; that the jury must bear in mind the presumption of innocence which must prevail unless the jury are satisfied from the evidence, under the court's instructions, that the defendant is guilty, beyond a reasonable doubt; that they were not to go outside the evidence to hunt up doubts, nor should they entertain a doubt that is merely fanciful, speculative, or chimerical, or which is based only on unreasonable or groundless conjecture; that a doubt which ignores a reasonable construction of the whole evidence is not a reasonable doubt, and that guilt is proven beyond a reasonable doubt when all the evidence in the case, clearly, impartially and rationally considered, is sufficient to impress the judgment of ordinarily reasonable and prudent men with a conviction on which they would act in their own gravest and most important affairs of life. *Held*, that such instruction is not subject to the criticism that it assumes that the jury were to start with the assumption that conviction should result, unless a reasonable doubt was proved, and could not reasonably be so understood by them.

11. In a criminal prosecution the jury having returned a second time for further instructions, the court charged them generally as to their duties in the matter of agreement, in substance, that the case had taken considerable time, had cost

considerable money, and that it was important and desirable that they should come to an agreement; that he would read them what the supreme court had said, to the end that it might guide them in their further consideration of the case; that in a case tried before Judge B., then on the supreme bench, the jury, after failing to agree, were brought into court and informed that they ought not to stand out in an unruly and obstinate way, but should reason together and talk over the existing differences, if any, and harmonize the same if possible; that Justice C. approved the instruction; that in another case the instruction was given and approved by the court; that it was the duty of each juryman to give careful consideration to the views of others, not to shut his ears, and stubbornly stand upon the position he first took, regardless of what may be said by other jurymen; that it was the object of all to arrive at a common conclusion, and to that end, they should deliberate together with calmness. The court then added that each juror should be convinced beyond a reasonable doubt, as already instructed, and directed the jury to retire and see if they could not agree upon a verdict. *Held*, that while it would have been better had reference to expense and the justices of the supreme court been omitted, it did not constitute prejudicial error, and in other respects the instruction was unexceptionable.

12. In a prosecution for embezzlement, when the verdict was returned into court, the presiding judge stated it could not be received because not in proper form; that there were two counts, and the jury were to find on each by itself, and that he would send them back to correct the verdict in that particular. The district attorney then called the court's attention to its instruction that the jury could set down the amount, if they did not find the amount charged in the information. The court thereupon repeated the form of a verdict, closing with the words, "and that the value of the money embezzled exceeds a certain amount," which the jury were instructed to insert; that the court would fix the verdict so they would have no trouble, and that they could put in a specified amount, as they pleased, or state that the embezzlement exceeded a certain amount. *Held*, that the court did not thereby intrench upon the province of the jury, and there was no error in the procedure followed by the court.

13. Ch. 268, Laws of 1903 (providing that exceptions to refusal to instruct the jury may be taken at any time before the close of the trial term), has no application to trials taking place before it went into effect.

ERROR to review a judgment of the municipal court of Milwaukee county: B. F. DUNWIDDIE, Judge. *Affirmed.*

The defendant was prosecuted and convicted before the municipal court of Milwaukee county of the crime of embezzlement, and brings his writ of error to reverse the sentence. The original information was in two counts. The first count charged that on January 3, 1899, at Milwaukee county, "the defendant, *Leroy W. Secor,* was then and there a servant, agent, and employee of the Goodrich Transportation Company, a corporation then and there duly created, organized, and existing under and by virtue of the laws of the state of Wisconsin, and he, the said *Leroy W. Secor,* not being then and there an apprentice, nor a person under the age of sixteen years, did then and there, by virtue of his said employment, and whilst he was so employed, have the care, custody, and possession of a certain sum of money, to wit, the sum of eight thousand one hundred fifty-seven dollars and fifty-nine one-hundredths dollars ($8,157.59), to the value of eight thousand one hundred fifty-seven and fifty-nine one-hundredths dollars ($8,157.59), of the money and property of said Goodrich Transportation Company, corporation as aforesaid, and the said moneys did then and there, and whilst he was so employed as aforesaid, unlawfully and feloniously embezzle to his own use, without the consent of his said employer, the Goodrich Transportation Company, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin." The second count of the information charged the embezzlement of the sum of $9,859.18 on the 3d day of July, 1899, in the same language used in the first count. Upon arraignment the defendant pleaded not guilty to this information. Thereafter, and on the 19th day of May, 1902, the district attorney, by leave of court, filed an amended information, in which, after the allegation that the defendant *Secor* was a clerk, servant, agent, and employee of the Goodrich Trans-

portation Company, the following words were inserted: "to wit, the cashier of the Goodrich Transportation Company, corporation as aforesaid, at its Milwaukee agency, and was then and there charged as such cashier, with the duty of receiving, safely keeping, and depositing the money, checks, and drafts of said Goodrich Transportation Company, corporation as aforesaid, at its Milwaukee agency, and of keeping the books of account of said Goodrich Transportation Company, corporation as aforesaid, at said agency." Also by inserting before the words "have the care, custody, and possession of a certain sum of money," the words "receive and take into his possession." Also by inserting after the statement of the sum of money alleged to have been embezzled the words "good and lawful money of the United States." The defendant objected to the filing of the amended information, but reserved no exception to the ruling of the court, and pleaded "Not guilty" thereto. The case was brought to trial June 10, 1902, and at the opening of the trial the defendant moved that the state furnish a bill of particulars, which motion was overruled, and exception taken. The defendant then moved that the amended information be quashed and dismissed because (1) it was filed without notice to the defendant; (2) because the defendant had pleaded to the information then on file; (3) because it contained an amendment which could not have been made to the original information. This motion was denied, and exception taken. The jury returned a verdict of guilty on the first count of embezzling a sum exceeding $600, and on the second count of embezzling a sum exceeding $100. Motions to set aside the verdict and for a new trial and in arrest of judgment were overruled, and exceptions duly taken.

*A. C. Umbreit,* for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General,* and *L. H. Bancroft* and *W. D. Corrigan,* assistant attorneys general, and a separate brief by *W. H. Bennett,*

district attorney, and *F. E. McGovern,* of counsel, and oral argument by *Mr. McGovern* and *Mr. Bancroft.*

WINSLOW, J. The errors claimed will be considered in their order as argued.

1. It is said that it was error to allow the filing of the amended information. The ground taken is that the proceeding by information is purely statutory, and that there is no provision allowing the filing of an amended information, and hence that an information cannot be amended in a material part any more than an indictment can be amended. *Allen v. State,* 5 Wis. 329. The particular parts of the amended information which are objected to are the statement that the defendant was the cashier of the Goodrich Transportation Company, charged with the duty of safely keeping its money, checks, and drafts, and the statement that he did receive and take into his possession the moneys charged to have been embezzled. It may be a matter of considerable doubt whether the point has not been effectually waived. While the defendant objected to the filing of the amended information, he reserved no exception to the ruling of the court, and pleaded "Not guilty" to the new information. It has long been the rule of this court that timely exception must be taken to the rulings of the court in criminal as well as in civil cases, or the objection will be deemed waived. *In re Roszcynialla,* 99 Wis. 534, 75 N. W. 167. However, as the defendant moved to quash the amended information at the opening of the trial, we have concluded to consider the question on the merits. Criminal prosecutions at common law were either by information of the prosecuting officer, or by indictment of a grand jury. In general terms, it may be said that prosecution by information was permissible in misdemeanors, but that felonies could only be prosecuted by indictment. While, as a general rule, indictments could not be amended by the court in matters of substance,

it was well settled that informations could be amended, or an entirely new information filed, by leave of the court. This distinction was based simply on the fact that the prosecuting officer, unlike the grand jury, was always present in court. 1 Bishop, New Crim. Proc. § 714; 1 Ency. Pl. & Pr. 696–698; *Long v. People,* 135 Ill. 435, 25 N. E. 851. Our constitution, as originally adopted, provided that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury." Sec. 8, art. I, Const. This clause was, however, amended in 1870 so as to read, "No person shall be held to answer for a criminal offense without due process of law;" and by ch. 137, Laws of 1871 (the provisions of which are now preserved in our statutes), all crimes can be prosecuted by information. This law has been held constitutional. *Rowan v. State,* 30 Wis. 129. While the legislature prescribed the form of the information, and made numerous regulations as to the manner of its use, it cannot be reasonably held that they thereby destroyed its well-settled characteristics at common law, any further than such regulations necessarily had that effect. It was amendable at common law, and the mere fact that its use was extended so as to include other offenses not formerly included within its scope furnishes no reason for holding that this power of amendment was intended to be taken away. The rules applicable to amendments to indictments are not enforced against amendments to informations. *Jackson v. State,* 91 Wis. 253–261, 64 N. W. 838. The prosecuting officer is present in court. He may file an information for any offense which the preliminary examination shows to have been committed, whether it be the offense charged before the examining magistrate or not. If it be ascertained before trial that the information so filed be defective or does not charge the proper offense, no good reason occurs to us now why the prosecuting officer may not, with the consent of the court, amend the information, or substitute a new one; due

care being taken that the accused is not taken by surprise, or otherwise deprived of any substantial right. Doubtless where, as here, an amended information is filed, it must be considered as superseding and taking the place of the original information.

At the close of the state's case the defendant moved for the direction of a verdict of not guilty, for failure of proof in several particulars, among which was that it was not shown that the money embezzled was "good and lawful money of the United States," as charged in both counts of the information. The motion was overruled, and exception taken. After the defense had entered on its case, the district attorney moved to amend the information by striking out the words "good and lawful money of the United States," in both counts, so as to conform to the proofs in the case; there having been no proof as to the exact character of the money alleged to have been embezzled. This amendment was allowed against objection, and exception was duly taken to the ruling. We are clearly of the opinion that this amendment was rightly allowed, under the terms of sec. 4703, Stats. 1898, which allows amendments in case of variance between the statement in the indictment or information and the proof "in the name or description of any person, place, or premises, or of *any thing,* writing or record or the ownership of any property described in the indictment or information." The money embezzled is unquestionably a "thing" described in the information, and our statute (sec. 4666, Stats. 1898) specifically allows any kind of money embezzled to be described simply as money, without designating its particular species.

2. The second contention made is that the *corpus delicti* was not proven by any evidence, save extrajudicial confessions, and that this latter class of evidence is insufficient, when standing alone, to establish the *corpus delicti.* Whether this last-named legal proposition be correct or not, we find it unnecessary to determine, because we find ample evidence

outside of the confessions to prove the body of the crime. The information in this case was framed under sec. 4667, Stats. 1898, which provides that, in any prosecution for embezzlement, it is sufficient to allege generally in the indictment or information "an embezzlement of money to a certain amount or of property to a certain value, without specifying any particulars of any such embezzlement, and on the trial evidence may be given of any such embezzlement committed within six months after the time stated in the indictment or information; and it shall be sufficient to maintain the charge . . . and shall not be deemed a variance if it shall be proved that any money or property of whatever amount, was fraudulently embezzled by the defendant within the said period of six months." The evidence produced by the state showed that the business of the Goodrich Company consisted of the transportation of passengers and freight upon Lake Michigan, and the business of the Milwaukee office aggregated many thousands of dollars during the year. *Secor* was the cashier of the Milwaukee office, and, as such, was charged with the collection and deposit in bank of the amounts received from freights and ticket sales at Milwaukee during the year 1899, and for some time previous thereto. He was also charged with the duty of keeping practically all the books at the Milwaukee office, and did so, with the assistance, to some extent, of other employees. These books were all introduced in evidence, and it appeared from the examination of expert witnesses who had carefully examined them that these books showed a shortage in *Secor's* accounts of more than $8,000 during the six months from January 3 to July 3, 1899, and of more than $9,000 from July 3, 1899, to January 2, 1900. The evidence tended to show that monthly balances were taken, and that the shortage was concealed by the defendant by a system of throwing forward receipts which came in at the end of the month into the next month's account, and entering expenses paid during the early days of one month

among the expenses of the previous month. The receipts consisted of cash, checks, and drafts, and no attempt was made to specify the particular amount of each; nor was it attempted to show that *Secor* embezzled or converted any specified item of money at any definite time. There was evidence, also, that *Secor* made false trial balances in October and November, 1899, in response to a demand from the central office, at Chicago, and that at one time during the year he borrowed money to pay a shortage in his accounts, which he said he had lost by speculation, and again that after he left the employ of the company he went to New York, and was there found living under an assumed name. All of these circumstances are certainly incriminating, and we have been unable to see how it can be said that they do not furnish proof of the body of the crime, if it be a fact that embezzlement can be shown under sec. 4667, *supra,* without proving the conversion of a specific item. Here, however, we are met with the claim that the section in question does not mean that proof of a general shortage is sufficient, but that the embezzlement of a particular sum or item must be shown, and that any other construction would render the section unconstitutional, because the defendant would not be apprised of the exact offense with which he is charged. The statute in question came from Massachusetts, where it was first adopted many years ago. *Comm. v. Wyman,* 8 Metc. 247. It was adopted by Michigan, and afterwards by Wisconsin and Minnesota. Its purpose, plainly, was to relieve the prosecution from some of the difficulties which necessarily were present under the former strict rules of allegation and proof in embezzlement cases, where a trusted agent had carried on his criminal operations for a long period of time. It is very aptly said in the case of *State v. Holmes,* 65 Minn. 230, 68 N. W. 11:

"Embezzlement in such cases very often consists of a series of acts running through a considerable period of time. These separate acts and the amount and description of the property

misappropriated at any one time may not be susceptible of direct proof, while the aggregate result is. The body of the crime consists of this series of acts done by virtue of the fiduciary relation between the employer and the employee, all of which virtually constitute a continuing breach of trust. Prior to this statute, conviction was often difficult, if not impossible. . . . The statute was enacted to avoid these difficulties, first, by authorizing this general form of indictment; second, by permitting this liberality of proof as to the description of the property; and, third, by permitting a conviction of the aggregate amount embezzled by a series of acts from the same employer."

It was also said by the supreme court of Michigan in *People v. Hanaw,* 107 Mich. 337, 65 N. W. 231:

"We think, however, that it is within the power of the legislature to prescribe the form of indictments, keeping in view the constitutional right asserted in this case [i. e., the right of the defendant to be apprised of the charge against him]; and where, as in a case of embezzlement, a defendant has a right to have the charge made certain by examination or by a bill of particulars, it cannot be said that he is not informed of the nature of the charge."

We adopt the views expressed in these two cases.

3. But it is said by the defendant that the court refused his request for a bill of particulars, and that this refusal constituted error. Undoubtedly, as said in the case last cited, the defendant has a right to have the charge against him made certain. The usual way of doing this would be by the furnishing of a bill of particulars; hence the court will generally order such a bill to be furnished, in an embezzlement case, where the indictment is a general one, framed under the provisions of sec. 4667, *supra.* But the refusal to furnish such a bill is not necessarily error, provided the information which the bill would contain has been otherwise furnished. In the present case it appears that there was preliminary examination held, at which the expert who examined the books submitted statements or schedules showing the condition of the

books and the shortage appearing therefrom, and that a copy of these schedules was then furnished to the defendant, and that defendant had access to all of the books, and examined them and made memoranda therefrom before the trial. These schedules were also introduced in evidence on the trial of the case in connection with the testimony of the expert. Thus it appears that the prosecution confined itself upon the trial to the same claims as those made upon the preliminary examination, and that the defendant was fully informed of such claims upon the examination. Such being the case, it was not error to refuse the demand for a bill of particulars. *People v. McKinney,* 10 Mich. 54.

4. At the close of the evidence for the prosecution the state offered a number of books which were kept in the Milwaukee office in connection with the business, called "Freight Received Books," "Prepaid Receipts," "Advance Charges," and "Billbooks," which were not in the handwriting of the defendant, and the admission of these books is now assigned as error. No objection was made to the introduction of these books at the time they were offered and received, but after the state had rested, and the case was with the defendant, he made a motion to strike out the books as hearsay. As we have before seen, timely exceptions must be reserved to rulings of the court in a criminal case as well as in a civil case; and we are inclined to the opinion that the defendant has waived any objection he might have to the introduction of these books by failing to object to them at the time they were offered, especially in view of the fact that he was fully apprised of their nature and contents, and does not even claim any surprise or inadvertence as a reason for his failure to object. But even if the point be considered as properly raised by the motion to strike out, we find no error in the reception of the books. The defendant was the bookkeeper of the company at the Milwaukee office and charged with the general supervision of all the books kept in the business at that office. The

books in question were a part of the books for the keeping of which the defendant was responsible, although the entries themselves may have been made by subordinate employees. It doubtless was his duty to see that they were properly kept, and we think they were admissible in evidence, not as conclusive evidence, but as books kept under the defendant's supervision and general control, of whose correctness he should, in the performance of his duty, have knowledge. *People v. McKinney, supra.*

5. The claim that the evidence fails to show the conversion or embezzlement of money cannot be sustained. There was ample evidence that the amount embezzled was money. It is true that the evidence showed that checks, drafts, money orders, and express orders were received in payment of freights as well as money; but all the receipts were entered on the books, either by the defendant or his subordinates, as money, and thus the books make a *prima facie* case of the embezzlement of money. The bank account was absolutely correct. So there could have been no embezzlement through the bank. There was evidence of a number of confessions made by the defendant to different persons, in all of which he spoke of his embezzlement as an embezzlement of money which he lost in speculation. Considering the difficulties which surround the prosecution in a case of this kind, running through a long period of time, we think that the proof was ample to show that the amount taken was in money.

6. Error is claimed by reason of certain instructions given by the court. At the opening of his charge the court made some general remarks on the nature and gravity of the offense charged, as follows:

"The offense charged in the information is a grave one, as it involves the criminal betrayal and breach of trust, reposed in a trusted employee. The entire property of a corporation must of necessity be intrusted to, and its business carried on

by, its employees, for, whether we call them officers, agents, servants, or by some other name, they are nevertheless its employees. And to a large extent the property and business of individuals must be intrusted to employees, such as clerks, cashiers, and the like; and it is a matter of great importance that all employees who, by virtue of some special confidence reposed in them, are intrusted with their employers' money or property, should faithfully care for and honestly account for whatever is committed to their care, custody, or possession. Both corporations and individuals can protect their property from strangers by bolts and bars and iron doors, but not so with trusted employees. The crime of embezzlement involves not only the fraudulent conversion of an employer's money, but also a wrongful betrayal of the trust and confidence reposed by the employer in the employee. The case is also an important one on the part of the defendant, because it involves his personal liberty and his reputation and character. Important to the state especially, perhaps, as it is charged with the grave duty of apprehending and convicting and punishing those who do commit criminal offense, it is equally important to the defendant, because, as I have already suggested, if you should convict him it would take away his personal liberty for a time. I therefore ask your careful and close attention to such instructions as I shall give to you, by which you are to be guided in considering the evidence and arriving at your verdict."

It is seriously urged that these general instructions, or at least some parts of them, are erroneous, because they amount practically to an argument in favor of the state, and tend to neutralize all subsequent instructions as to presumption of innocence and reasonable doubt. We have been unable to see the force of these criticisms. To our minds, the sentences quoted are entirely proper for the purpose of impressing on the jury the gravity of the crime, and the importance both to the state and the defendant of a careful consideration of the evidence and the instructions.

Upon the subject of reasonable doubt, the court, after hav-

ing charged the jury that the defendant was presumed innocent until the evidence satisfied them beyond a reasonable doubt of his guilt, said:

"By 'reasonable doubt' I mean a doubt of guilt for which a reason can be given, arising out of the evidence."

Later in the charge the court charged as follows:

"As already said, you must bear in mind all through your deliberations the presumption of innocence hereinbefore explained, and that such presumption must prevail unless you are satisfied from the evidence, under the court's instructions, that the defendant is guilty, beyond a reasonable doubt. I have already told you that a reasonable doubt is a doubt of guilt for which a reason can be given, arising out of the evidence. You are not to go outside of the evidence to hunt up doubts, nor should you entertain a doubt that is merely fanciful, speculative, or chimerical, or which is based only upon unreasonable or groundless conjecture. A doubt which ignores a reasonable construction of the whole evidence is not a reasonable doubt. Guilt is proven beyond a reasonable doubt when all the evidence in the case, clearly, impartially, and rationally considered, is sufficient to impress the judgment of ordinary reasonable and prudent men with a conviction upon which they would act without hesitation in their own gravest and most important affairs of life."

It is said that this charge falls within the criticism made by this court of a charge on the subject of reasonable doubt in the case of *McAllister v. State,* 112 Wis. 496, 88 N. W. 212, to the effect that it assumes that the jury are to start with the assumption that conviction is to be the result unless a reasonable doubt is proven. We do not think that such is its effect, or that it could be reasonably so understood. The jury were twice told in this very connection that the presumption of innocence attended the defendant all through the trial, and must prevail unless the evidence satisfied them of the defendant's guilt beyond a reasonable doubt. The definition of "reasonable doubt" given is fairly equivalent to the instructions approved in *Frank v. State,* 94 Wis. 211, 68 N. W. 657, and *Emery v. State,* 101 Wis. 627, 78 N. W. 145.

It appears by the record that the jury returned into court twice for further instructions. Before they retired the second time, the court charged them generally as follows:

"I desire to instruct you a little farther as to the duties in the matter of an agreement in this case, as it has taken considerable time; it has cost, of course, considerable money; and it is important and desirable that, if you can come to an agreement, that you should do so; and I will read to you what our supreme court has said in this regard, to the end that it may guide you in your further considerations. In a case that was tried before Judge BARDEEN, now on the supreme bench, after the jury had been out some time and failed to agree they were brought into court, and informed by the court, in effect, that they ought not to stand out in an unruly and obstinate way, but should reason together, and talk over the existing differences, if any, and harmonize the same, if possible; that it was their duty to meet the testimony in a spirit of fairness and candor with each other, and not stand back obstinately, but to reason together, and to apply the law as given by the court to the facts in the case, and arrive at a verdict. And Justice CASSODAY approves that instruction as a proper instruction to the jury. So, also, in another case, the instruction was given, and approved by the court. It is the duty of each juryman, while the jury are deliberating upon their verdict, to give careful consideration to the views his fellow jurymen may have to present upon the testimony in the case. He should not shut his ears, and stubbornly stand upon the position he first takes, regardless of what may be said by other jurymen. It should be the object of all of you to arrive at a common conclusion. To that end, you should deliberate together with calmness. You may retire again, and see if you can agree upon a verdict. If you become convinced that you cannot, then you will so notify the officer, and he will let me know."

To this was added the statement:

"Of course, each juror should be convinced beyond a reasonable doubt, as I have already instructed you; and I trust that you will now calmly deliberate, and see whether or not you can or cannot agree upon a verdict."

It is said that these remarks were so far threatening or coercive as to come within the criticism made by this court in the case of *Hodges v. O'Brien,* 113 Wis. 97–106, 88 N. W. 901. It would have been better, had the question of expense and the reference to the justices of this court been omitted, but we are not ready to say that prejudicial error results therefrom. In other respects the instructions are unexceptionable.

When the jury finally returned into court with a verdict in writing, it was passed to the court, and the following colloquy took place:

"Court: This verdict I cannot receive. It is not proper in form. You mean all right, but there are two counts, and you remember that I instructed you that you must find him guilty or not guilty of the first count, and guilty or not guilty of the second count. Each count must be found separately by itself. I will have to send you back to correct your verdict in that particular. You may amend it, if you desire. District Attorney: I think the instruction was that they might set the amount, if they did not find the amount charged in the information. Court: What I stated to you was that you might say: 'We, the jury impaneled to try the issue herein, find the defendant guilty as charged in the first count of the information, and that the value of the money embezzled exceeds a certain amount,' which you will insert, say, exceeding $100 or $500, or any other sum that you agree on. I will fix the verdict so that you will have no trouble. You can put a specific amount that you want to, or you can put down, say, exceeds a certain amount."

The jury then retired, and later returned into court with a verdict by which they found the defendant guilty under the first count of embezzling a sum exceeding $600, and on the second count of embezzling a sum exceeding $100. Just what the difficulty was with the original verdict does not appear, but it would seem from the remarks of the court that the jury had failed to find a separate verdict as to each count. If the verdict was informal or incomplete, it was subject to

correction at any time before the jury was discharged from the case. Indeed, it was the plain duty of the court to see that opportunity was given the jury to return a perfect verdict, so that justice might not miscarry. We have been unable to see that the court trenched upon the province of the jury. On the other hand, the presiding judge seems to have been careful to leave all questions of fact to the jury. We have found no error in the procedure followed by the court.

7. A number of instructions were asked by the defendant and refused. It is a matter of some doubt whether proper exceptions were taken, under the recent ruling in *Gehl v. Milwaukee P. Co.* 116 Wis. 263, 93 N. W. 26. The record affirmatively shows that they were not taken until after the jury had returned into court with the original verdict, but whether they were taken before the corrected verdict was returned is left in uncertainty. Even if it be considered that proper exceptions were taken, it does not seem necessary to discuss the questions raised in detail. The more important of them have already been disposed of in this opinion in the discussion of other exceptions. So far as correct and applicable, the instructions requested were fairly covered by the charge of the court. It is proper to note that the rule announced in *Gehl v. Milwaukee P. Co. supra,* has now been changed by ch. 268, Laws of 1903, so that exceptions to refusals to charge may be taken at any time before the close of the trial term. This law, however, has no application to the present case, as the trial took place before its passage.

Upon the whole record, we have found no prejudicial error.

*By the Court.*—Judgment affirmed.

# CASES DETERMINED

AT THE

# August Term, 1903.

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## LOWE, Plaintiff in error, vs. THE STATE, Defendant in error.

*February 28—September 8, 1903.*

*Criminal law and practice: Assault with intent to kill: Continuance: Loss of jurisdiction: Waiver: Verdict: Evidence: Witnesses: Cross-examination: Prejudicial error: Impeachment of witnesses: Insanity: Physicians and surgeons, qualifications as experts: Hypothetical questions: Instructions to jury: Intent: Reading extracts from opinions of supreme court.*

1. In a prosecution for an assault with intent to kill, after the jury impaneled to try a special plea of insanity had disagreed and been discharged, the court forthwith ordered "the trial upon the plea of not guilty to proceed." Two days thereafter an order was made and entered, with the consent and concurrence of the accused and his attorney, continuing the cause until the next term of court. *Held*, that thereby the accused waived any objection to such continuance, and that the court did not thereby lose jurisdiction.
2. In a criminal prosecution the information, by appropriate allegations, charged the accused with having made an assault upon L. with a loaded revolver and a razor, "with intent then and there, feloniously, and of his malice aforethought, to kill and murder the said L." The verdict was: "We, the jury impaneled to try the issues in the above entitled action, find the defendant guilty." *Held*, that the verdict was not defective, but found the accused guilty of the offense charged in the information.
3. In a prosecution for assault with intent to kill, a plea of insanity of the accused was interposed. A witness for the prosecution, on cross-examination, among other things, testified that

she might have said on a former trial, that on the morning of the assault the accused looked pale, considerably more than usual; that he had one of his funny jealous spells; that it was a fact that she thought him jealous; that she always said he was awful jealous; that his look was more unusual that morning than before; that his strange look that morning made her watch him, and that he did not look as he ought to that morning. *Held*, that it was not prejudicial error to refuse to allow such witness, on further cross-examination, to testify as to whether, on the preliminary examination, she had not stated that the accused had jealous spells about every two weeks; the court ruling that it was improper on such cross-examination to go generally into the life of the accused, but that the defense was at liberty to inquire as to anything connected with his conduct on the morning in question, and perhaps the evening before, or any past experience which might explain his conduct.

4. In a prosecution for assault with intent to kill his wife, in which the accused interposed a plea of insanity, B., a witness for the prosecution, testified that he saw the accused buying a revolver and a box of cartridges at a hardware store prior to the commission of the offense, and that on such occasion the accused stated to witness that he "was having a hell of a time with the old woman," that he had "drawn the wood away from the house, that she could freeze to death, and that the next time he had a row" with her (using an opprobrious epithet), "he would fill her head so full of lead that she would not know where she was standing;" that he told L., a witness afterwards called for the defense, that the accused did not appear to have been drinking, but he could not remember stating to L. that he believed the accused was insane at the time he bought the revolver. *Held*, that the mental condition of accused, as he appeared to B. at the time, was necessarily for the consideration of the jury, and it was error to refuse to permit L. to answer the question: Did he (B.) say to you, in that conversation, that he believed the defendant was insane?

5. In a criminal prosecution the accused having interposed a plea of insanity, a medical expert, called by the accused, in answer to a hypothetical question, stated that the accused was insane. Thereupon the court asked him the question: "What would you say, doctor, of the 300 men who burned the negro at the stake; stood there, and lighted the fire, and stood by when he was begging to be shot; waited around, and watched the flames lick up his body—what would you say about the sanity

of those men?" *Held*, that such question was improper, and its answer irrelevant.

6. In such case, it is the duty of counsel to call the court's attention to the impropriety of the question at once, so that it may be immediately corrected. But failing to make such objection, and take exception thereto, the error thereby committed cannot be available in the appellate court.

7. A medical witness, offered as an expert, is competent to testify on the subject of insanity, when it appears that he has graduated from a regular medical college, has a license to practice medicine from the state board, has practiced eighteen months, has had opportunity to see and study insane patients during his medical course, and during his practice has treated four patients for insanity.

8. Under the provisions of sec. 585, Stats. 1898 (providing that no physician shall be appointed examiner in lunacy unless he has certain enumerated qualifications, including three years' experience in the practice of his profession, or one year's experience in a hospital for the insane after his graduation), a physician who has had only eighteen months' experience in the practice of his profession, and no experience in a hospital for the insane after graduation, is competent to testify as a medical expert.

9. When a hypothetical question put to an expert is objected to as incompetent, and as not based upon the evidence in the case, it is error to overrule such objection, where there is no testimony to sustain the facts stated in the question as the basis for the conclusion asked.

10. On the trial on an issue of insanity, pleaded by the defendant charged with an assault with intent to kill, nonexpert witnesses, who were acquainted with and had business dealing with the accused, may testify to their opinions as to his sanity or insanity.

11. In a prosecution for assault with intent to kill, the court instructed the jury: "If the jury believes from the evidence, beyond a reasonable doubt, that the defendant did shoot his wife and cut her throat as charged in the information, and that the natural, probable and ordinary consequences of such acts would be the death of such wife, and that defendant was of sound mind at the time he committed these acts, then the *presumption of law* is that the defendant did so assault his wife with intent to kill her; and if such assault and shooting, under the circumstances, was done with the premeditated design to effect the death of said wife, the defendant being sane at the time, the jury should find the defendant guilty, as

charged." *Held*, that there was no prejudicial error in giving such instruction, although it was subject to the criticism that the jury were thereby told that the facts therein recited *raised a presumption of law* that the accused did so assault his wife with intent to kill her.

12. In a criminal prosecution where the accused interposes the defense of insanity, it is not error to instruct the jury: "Insanity means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or not conscious at the time of the nature of the act he is committing; and where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will—by which is meant the governing power of his mind—has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control."
13. In such case, it is not error to instruct the jury, that it is not to be inferred that a person is insane from the mere fact of his committing the crime, or from the enormity of the crime, or the absence of adequate motive.
14. In such case, it is not error to instruct the jury: "Moral or emotional insanity does not exempt a person from criminal responsibility. Mere moral insanity, or temporary frenzy or passion, arising from excitement or anger, and not from mental disease, is not an excuse for crime."
15. In a criminal prosecution where the accused has pleaded insanity, it is error to read extracts from an opinion of the supreme court, rendered in an equity action to set aside a will on the ground of insanity of the testator. The two cases are so broadly distinguishable in their facts as to make the extracts read inapplicable to the criminal prosecution, and hence misleading to the jury.
16 Error cannot be assigned on refusal to give requested instructions that are substantially covered by the instructions given.

ERROR to review a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

The plaintiff in error was charged with having on June 12, 1899, made an assault upon his wife, Amanda Lowe, while armed with a revolver and razor, with the intent to kill and murder her. To such information he entered a plea of not guilty, and with such plea he also made and filed a special plea, alleging his insanity at the time of the alleged offense.

The special plea was tried April 25, 1900, and the jury were unable to agree upon a verdict, and were thereupon discharged from further consideration of the case. Thereupon, and on April 25, 1900, the court made an order (entered in the clerk's minutes) forthwith ordering the trial to proceed upon both pleas—that of not guilty, and also the special plea—but nothing was done until April 27, 1900, when, with the consent and concurrence of the accused and his attorney, an order was made and entered in the clerk's minutes, continuing the cause until the next regular term of the circuit court, which was appointed to be held in October, 1900. Subsequently, a jury trial was had on both pleas, and at the close of such trial, November 30, 1900, the jury returned a verdict of guilty. The court denied successive motions to arrest the judgment and for a new trial. December 12, 1900, and at the same term of the court, the accused was, by the judgment of the court, sentenced to the state prison for the term of eight years. To reverse such judgment and sentence the accused sued out this writ of error.

It appears from the record, and is undisputed, that the accused at the time of the trial was fifty-four years of age; that he lived in England and Rhode Island most of the time, working in cotton mills, until he was twenty-eight years of age, when he came with his first wife to Jackson county; that he only had three months' schooling; that he lived with his first wife about eight years, and had by her six children; that he was divorced from her; that he thereupon moved to Neillsville, in Clark county, where he was engaged in the butcher business, and where the offense was committed, and married his second wife, but was divorced from her soon afterwards; that thereupon he married his third wife, Amanda Lowe, mentioned, in March, 1897, and separated from her in September, 1897, but afterwards came back to her, and lived with her until in June, 1899; that he had no children by his second or third wife, and all three wives were women of irre-

proachable character, absolutely above any suspicion of infidelity; that June 10, 1899, the accused told his wife, Amanda, to pack up and go, as they could not get along together, but that instead of doing so at that time, she went to the house of her son by a former marriage, near by, and remained there until the morning of June 12, 1899, when she went back to her husband's house, and commenced to pack up; that with her at the time were Mrs. Ray Carlton and Mrs. Bertha Montgomery, daughters of Mrs. Lowe, and two small children of Mrs. Montgomery; that while Mrs. Lowe was in the bedroom, packing her belongings, where the accused was at the time, and when her back was turned toward him, he shot her in the back of the head, and she fell to the floor, and while lying on the floor he fired two or three other shots, one of which inflicted another wound in the head; that the accused thereupon walked into the kitchen, and fired two shots at himself, inflicting but slight wounds in his chin and forehead; that Mrs. Carlton thereupon ran from the house in search of assistance, and Mrs. Montgomery, who witnessed the entire occurrence, succeeded in disarming the accused of the revolver; that thereupon the accused started for the room where his wife was lying, and in spite of the efforts of Mrs. Montgomery, cut his wife's throat with a razor, severing the windpipe and the front half of the gullet, and also the anterior jugular and the right external jugular; that in such condition Mrs. Lowe, with the assistance of Mrs. Montgomery, made her escape, and succeeded in reaching the house of a neighbor, where medical assistance was procured, and she recovered; that the accused was in the habit of addressing his several wives in terms of the vilest obscenity and most disgusting profanity.

*R. J. MacBride,* for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *L. H. Bancroft,* first assistant attorney general, and oral argument by *Mr. Bancroft.*

CASSODAY, C. J. There is no claim that the evidence is insufficient to support the verdict. Counsel for the accused insists, however, that "the evidence was amply and abundantly sufficient to carry the question of the accused's insanity to the jury." Numerous errors are assigned.

1. It is claimed that the court lost jurisdiction because two days after the jury had disagreed and been discharged on the trial of the special issue of insanity, and the court had forthwith ordered "the trial upon the plea of not guilty to proceed" as prescribed by the statute (sec. 4697, Stats. 1898), an order was made and entered, with the consent and concurrence of the accused and his attorney, continuing the cause until the next term of the court. Counsel for the accused frankly concedes that such consent and concurrence was as broad and ample as possible, but suggests that by such continuance the court lost jurisdiction. There is nothing in the statutes prohibiting such continuance, and it is very manifest that the ends of justice and the rights of the accused might imperatively require such continuance. In all criminal prosecutions, the accused is entitled, as a constitutional "right, to a speedy public trial" in "the county or district wherein the offense shall have been committed" (sec. 7, art. I, Const.); and yet this court has held that such right "is waived by the accused when, upon his application, the place of trial is changed to another county." *Bennett v. State,* 57 Wis. 69, 75, 14 N. W. 912; *Wheeler v. State,* 24 Wis. 52. Certainly, the court did not lose jurisdiction by such continuance of the case at bar. We perceive no good reason why the consent and concurrence of the accused and his attorney to such continuance was not a waiver of any objection to the same.

2. We find no reason for arresting the judgment on the ground of defective verdict. The information, with appropriate allegations, charges the accused with having made an assault upon Amanda Lowe with loaded revolver and razor, "with intent then and there, feloniously, and of his malice

aforethought, to kill and murder the said Amanda Lowe." The verdict is that "We, the jury impaneled to try the issues in the above-entitled action, find the defendant guilty." Such verdict, in effect, found the accused guilty of the offense charged in the information.

3. Error is assigned because a witness for the prosecution (Bertha Montgomery) was not allowed on cross-examination to testify as to whether, on the preliminary examination, she had not stated that he had jealous spells about every two weeks. She had already testified, on cross-examination, that she might have said on the former trial, in effect, that on the morning of the assault the accused looked pale, considerably more than usual; that he had one of his funny jealous spells; that it was a fact that she thought he was jealous; that she always said he was awfully jealous; that his look was more unusual that morning than before; that she did not expect to find him at home that morning, as she knew he was having one of his funny jealous spells; that his strange look that morning made her watch him; and that he did not look as he ought to on that morning. The ground stated for excluding such further cross-examination is to the effect that it was improper on such "cross-examination to go generally into the life of" the accused; but that the defense was at liberty to inquire as to anything connected with the conduct of the accused on the morning in question, and perhaps the evening before, or any past experience which might explain the conduct of the accused. We perceive no prejudicial error in such ruling.

4. Error is assigned because the court refused to allow the accused to prove that one Martin Bigger, a witness for the prosecution, made statements out of court contrary to his testimony in court. He testified to the effect that three or four months prior to the assault in question, the accused was at Merrillan, and he saw him buy a revolver and a box of cartridges at a hardware store; that he and the accused then

walked out of the store together; that the accused said "that he was having a hell of a time with his old woman;" that he had drawn "the wood away from the house, and she could freeze to death;" that he then advised the accused to leave his wife, if he could not live in peace with her; that the accused then said, in effect, that he had quit her; "that the next time he had a row with the damned old bitch he would fill her head so full of lead that she would not know where she was standing;" that he advised the accused against doing so, and to leave her if he could not live peaceably with her; that that was the last he saw of him. On cross-examination he testified to the effect that the accused did not seem to be intoxicated, had not been drinking, did not act strange; that he met a brother of the accused, Joseph Lowe, at Merrillan, before the examination of the accused before the justice; that he then told Joseph that he saw the accused buy the revolver in the hardware store, but did not think he told him all the remarks the accused made at the time; that he did not think he told Joseph to look out for the accused, that he was not right, that he believed he was insane—not exactly that; that Joseph said the accused was always crazy on the woman question; that he said to Joseph that a man must be either drunk or crazy to do such a thing as that, but did not remember of telling him that he believed the accused was insane at the time he bought the revolver; that he might have said that he thought there was something the matter with a man talking as the accused did when he bought the revolver; that he had a conversation with Joseph afterwards, at Neillsville, at the time of the examination before the justice; that Joseph then asked him what he knew about the "scrap," and he told him he was with the accused when he bought the revolver, and that a man who would do such a deed was either drunk or crazy (a remark a man would make in talking), but did not say that the accused was crazy or drunk; that he did not remember talking with Joseph again about their conversation at

Merrillan; that he did not think he told him that the accused was crazy when he bought the revolver. Joseph Lowe, brother of, and witness for, the accused, testified to the effect that he had but one conversation with the witness Bigger at Merrillan about the accused buying the revolver; that that was before the shooting, and might have been at the time mentioned by Bigger; that in that conversation Bigger related to him the circumstances and conversation he had with the accused. Thereupon he was asked this question: "Did he say to you, in that conversation, that he believed the defendant was insane?" On being objected to as incompetent, irrelevant, and immaterial, the same was excluded. Counsel for the accused then insisted that, as Bigger had attempted to narrate a conversation had with the witness Joseph Lowe, he was entitled to have the whole of that conversation; but the objection was sustained. Such ruling was based upon the theory that it was "not of the slightest importance" as to "what Mr. Bigger's belief was as to the sanity of the" accused; that "the state did not call him for the purpose of asking him his opinion as to the sanity or insanity of the" accused, but that "out of liberality of cross-examination" he was permitted to make the "statement as to his belief" mentioned. It was certainly competent to cross-examine Bigger in respect to statements made by him out of court, to lay the foundation for his contradiction by way of impeachment. *Perkins v. State,* 78 Wis. 551, 559, 47 N. W. 827. The question recurs whether the statement sought to be contradicted was relevant to the issue.

One of the issues on trial was as to the sanity of the accused. The only hope of the accused seems to have been based upon the determination of that issue. The testimony of Bigger tended to prove that a short time before the shooting the accused bought the revolver, with the avowed purpose of shooting his wife. Of course, he could have no such intent

unless he was of sane mind at the time he bought the revolver, and told Bigger what he did. Bigger had testified to the effect that the accused did not appear to have been intoxicated, nor that he had been drinking, and did not act strange. Such testimony left the jury to infer that the accused was sane at the time he bought the revolver and made the statement mentioned, and that Bigger so regarded him. The mental condition of the accused, as he appeared to Bigger at the time, was necessarily for the consideration of the jury. *Comm. v. O'Brien,* 134 Mass. 198; *Comm. v. Hayes,* 138 Mass. 185; *Smalley v. Appleton,* 70 Wis. 340, 344, 35 N. W. 729; *Bridge v. Oshkosh,* 71 Wis. 363, 367, 37 N. W. 409; *Keller v. Gilman,* 93 Wis. 11, 66 N. W. 800. If Bigger told Joseph Lowe that he believed the accused was insane at the time he bought the revolver, then such statement was inconsistent with Bigger's testimony given in court upon a relevant issue; and hence it was competent to impeach the credibility of Bigger by showing that he made statements out of court inconsistent with those made in court. *Welch v. Abbott,* 72 Wis. 512, 40 N. W. 223; *Waterman v. C. & A. R. Co.* 82 Wis. 613, 628, 629, 52 N. W. 247, 1136. We must hold that the exclusion of such testimony was error.

5. Dr. Lyman, superintendent of the Hospital for the Insane at Mendota, was called as a medical expert witness on the part of the accused, and in answer to a hypothetical question, testified to the effect that in his judgment the accused was insane at the time of the shooting, June 12, 1899. Then, after being cross-examined by the state to the extent of twenty-one type-written pages, the court asked him this question:

"What would you say, doctor, of the three hundred men who burned the negro at the stake in Colorado; stood there, and lighted the fire, and stood by when he was begging to be shot; waited around, and watched the flames lick up his body—what would you say about the sanity of those men?"

The witness answered:

"I should think they were sane; that they were acting under what we call 'mob influence' at the time, and their emotions got the better of them."

We agree with counsel that the question was improper and the answer irrelevant; but it is conceded that no objection was made, much less an exception taken. This court has, from the beginning, refused to review rulings upon the trial of criminal cases, as well as civil, to which no exception was taken. *Knoll v. State,* 55 Wis. 249, 12 N. W. 369; *Rollins v. State,* 59 Wis. 55, 17 N. W. 689; *Grottkau v. State,* 70 Wis. 462, 472, 36 N. W. 31; *Porath v. State,* 90 Wis. 537, 63 N. W. 1061; *In re Roszcynialla,* 99 Wis. 537, 538, 75 N. W. 167, 168. In this last case it is said:

"In the trial of causes, as well as other matters conducted by human agencies, there will, unavoidably, be more or less inadvertence, irregularity, mistake, impropriety, and error. . . . By reason of these things, parties and their counsel, in criminal as well as civil cases, are required to bring any supposed impropriety or error to the attention of the court, and obtain a ruling or action thereon, at the earliest opportunity, in order to become available. Even then, the party feeling agggrieved must promptly take, and preserve in the record, his exception, or the supposed error will be deemed waived."

Counsel says that "it is sometimes a delicate thing for counsel to object to a question asked by the court." The authorities all seem to agree that the trial judge has the right to ask questions of witnesses when necessary to elicit the truth. See note to *South Covington & C. St. R. Co. v. Stroh,* 57 L. R. A. 878 *et seq.;* citing numerous adjudications. But if the trial judge asks an improper question, then it becomes the duty of counsel to call his attention to it at once, so that it may be immediately corrected. By reason of the failure to make such objection and take such exception,

the error in admitting such testimony is not here available to the accused.

6. Error is assigned because Dr. Conroy was permitted to testify as a medical expert. The objection is upon two grounds. One is said to be his lack of experience in such matters. It appears that he had graduated at a regular medical college, and had a license to practice medicine from the state board of this state, and had practiced therein for eighteen months; that the medical college he so attended had an insane pavilion, which would accommodate about thirty patients; that while he was there he had an opportunity to see and study, and did study, about one hundred such cases; that during his practice of eighteen months he had had four such cases to treat. Such actual experience certainly made him competent to testify within the rulings of this court. *Stilling v. Thorp,* 54 Wis. 528, 534, 535, 11 N. W. 906; *Boyle v. State,* 57 Wis. 472, 15 N. W. 827; *Soquet v. State* 72 Wis. 659, 40 N. W. 391; *Zoldoske v. State,* 82 Wis. 580, 605, 52 N. W. 778. The other ground upon which such objection is made is that the witness was precluded by the statute, which provides that "no physician shall be appointed such examiner in lunacy" of applicants for admission to the State Hospital for the Insane, "unless he shall be a graduate of a legally incorporated medical school, and shall have had at least three years' experience in the practice of his profession, or shall have had one year's experience as physician in an insane hospital after his graduation, and shall be registered by such county judge as thus qualified on a list to be kept for that purpose in his office." Sec. 585, Stats. 1898. The proceedings prescribed by that section are special, and practically *ex parte.* That section does not prescribe the competency of physicians or surgeons to testify as witnesses in courts of justice. This is manifest, not only from the language of that section, but from other sections of the statutes. Thus a phy-

sician or surgeon is precluded from the right to collect fees or compensation for services or for testifying in a professional capacity, unless he had received a diploma from a medical college, or a license from the state board of medical examiners, as prescribed. Sec. 1436, Stats. 1898. By another section of the statutes, it is provided that any person thus prohibited "from testifying in a professional capacity as a physician or surgeon" is punishable if he "shall assume the title of doctor of medicine, physician, or surgeon by means of any abbreviation, or by the use of any word, words, letter, or letters . . . or by any device whatsoever." Sec. 4603*a*, Stats. 1898. *Schaeffer v. State*, 113 Wis. 595, 89 N. W. 481; *Allen v. Voje*, 114 Wis. 1, 8, 9, 89 N. W. 924. We must hold that Dr. Conroy was competent to testify as a medical expert.

7. In answer to some twenty odd assumptions of fact, Dr. Conroy testified that in his opinion the accused was sane at the time of the shooting. The same witness was then asked this question:

"If you were to assume that for the period of twelve months immediately preceding his second marriage, defendant kept company with the woman who afterwards became his second wife, at which time he had a wife living, and she had a husband living, and neither of them were divorced, would that strengthen your opinion as to his sanity."

It was "objected to as incompetent, and as not based upon the evidence in the case." The objection was overruled, and the accused excepted. The witness answered that "it would." Counsel for the accused denied that there was any such testimony in the record, and in his brief requested counsel for the state to point out such testimony, if there was any; but no attempt has been made to point out any such testimony, and after a good deal of examination we fail to find any. The record contains nearly 500 type-written pages of testimony. If there is any such testimony in the record, it was the duty

of counsel for the state to point it out. Having failed to do so, and having failed to find any ourselves, we must assume that there is no such testimony. This being so, we must hold that the objection was improperly overruled. Upon the same assumption, and against objection, the witness answered that in his opinion the accused was able to distinguish between right and wrong June 12, 1899.

8. Error is assigned because numerous non-expert witnesses, who testified as to their acquaintance and dealing with the accused, mostly in buying meat from him at the shop, and seeing him at various times, were allowed to give their opinion, based upon such business relations with the accused and his appearance, as to his sanity or insanity. The admissibility of such testimony is fully sanctioned by numerous and recent decisions of this court. *Burnham v. Mitchell,* 34 Wis. 117, 133; *Crawford v. Christian,* 102 Wis. 51, 78 N. W. 406; *In re Guardianship of Welch,* 108 Wis. 387, 394, 84 N. W. 550; *In re Butler's Will,* 110 Wis. 70, 76, 77, 85 N. W. 678.

9. Error is assigned because the court charged the jury:

"If the jury believes from the evidence, beyond a reasonable doubt, that the defendant did shoot his wife and cut her throat as charged in the information, and that the natural, probable, and ordinary consequences of such acts would be the death of such wife, and that defendant was of sound mind at the time he committed these acts, then *the presumption of law* is that the defendant did so assault his said wife with intent to kill her; and if such assault and shooting, under these circumstances, was done with the premeditated design to effect the death of said wife, the defendant being sane at the time, the jury should find the defendant guilty, as charged."

The particular criticism is that, by the instruction so given, the jury were told that the facts therein recited raised a "presumption of law" that the accused "did so assault his wife with intent to kill her." Counsel concedes that a person of "sound mind is responsible for the consequences of his acts," but insists that such acts "must be acts done—acts accom-

plished;" that "the law does not presume a felonious intent from the shooting," nor from "the use of deadly weapons;" that the "intent, in a case of this kind, is a fact to be pleaded, proved, and found" by the jury, and is not presumed as a matter of law. In support of such contention counsel cites, among other authorities, the following, which are most in point: *State v. Bloedow,* 45 Wis. 279, 280; *Roberts v. People,* 19 Mich. 401, 414, 415; *Patterson v. State,* 85 Ga. 131, 11 S. E. 620, 21 Am. St. Rep. 152, and note 155; *People v. Landman,* 103 Cal. 577, 37 Pac. 518; Abbott's Trial Brief (2d ed.) 677, 678, No. 74; Lawson's Presumptive Evidence, 331, rule 66; Wharton, Criminal Evidence, § 764. In the case in this court it was held:

"In criminal law, when a special intent, beyond the natural consequences of the thing done, is essential to the crime charged, such special intent must be pleaded, proved, *and found.*"

RYAN, C. J., there said:

"Surrounding circumstances generally go far to show" the intent. "Sometimes the very act itself does. Thus, if one shoot another with a rifle in a vital part of the body, the act raises a presumption of intent to kill, unless the circumstances under which it is done go to repel the presumption."

In the Michigan case cited, it was held:

"When a statute makes an offense to consist of an act committed with a particular intent, which act and intent constitute, substantially, an attempt to commit a higher offense than that which was accomplished, proof of the particular intent is as necessary as of the act itself; but not, necessarily, by direct and positive testimony. It may be inferred from any facts in evidence which satisfy the jury of its existence."

In that case it was said by the court:

"No intent in law, or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of the latter."

That case has received repeated sanction in that state, the latest being *People v. Ochotski,* 115 Mich. 601, 606, 73 N. W. 889. In the Georgia case cited, the assault was with a weapon likely to produce death, but did not; and it was held that malice in an assault by stabbing did "not raise a presumption of an intent to kill." In a note to the case, it is said that, "to constitute the offense of an assault with intent to commit murder, a specific intent upon the part of the accused to take life is necessary."

In Abbott's Trial Brief, cited, it is said:

"The presumption of criminal intent, even where it has been shown that the act charged was done with the knowledge of the facts, is not a presumption of law, but is a question for the jury. It is error to instruct them that the law presumes a criminal intent. They may be instructed that from such facts they may infer criminal intent; but where a specific intent is necessary to make the act criminal, the specific intent cannot be inferred from the act."

That is quite similar to Lawson's rule 66, cited above, which is:

"Where a specific intent is required to make an act an offense, the doing of the act does not raise a presumption that it was done with the specific intent."

But that rule is mentioned as an exception to the general rule, just previously stated, by the same author, as follows:

"Where an act is criminal *per se,* a criminal intent is presumed from the commission of the act." Lawson, Presumptive Evidence, 327, Rule 65.

In support of that rule, the author cites a number of cases, including one from Massachusetts, from which he quotes at length, and where the opinion of the court was written by SHAW, C. J., and in which it was held:

"When on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious, and an act of murder, and proof of matter of

excuse and extenuation lies on the defendant." *Comm. v. York,* 9 Met. 93, 102.

The learned Chief Justice there said:

"The effect of the rule presented to the jury was that, if it was proved beyond reasonable doubt that the defendant had wilfully and voluntarily inflicted a mortal wound upon the deceased, malice was to be inferred from this act, unless such facts were proved, by a preponderance of the evidence, as would extenuate the homicide, and reduce it to manslaughter. This rule seems to rest on well-settled principles, and to be supported by a great weight of authorities."

In speaking of what the "law presumes," in the section of Wharton, cited, it is said, in effect, that "the use of the term 'law' is ambiguous, and is likely to mislead;" that "if it be said that the use of a weapon likely to inflict a mortal blow implies, *as a presumption of law,* in its technical sense, a deadly design, this is error;" that "there is no such thing as a purely abstract killing;" but that, "when a person without authority, and with the appearance of deliberation, shoots another, we infer, as a presumption of *fact* (not of *law*), design;" that "taking aim at another with a gun, by a person without authority, and not in public war, and then firing, ordinarily implies an intent to kill." A standard text-writer uses this language:

"Another cardinal doctrine of criminal law, founded in natural justice, is that it is the intention with which an act was done which constitutes its criminality. The intent and the act must both concur to constitute the crime. . . . And the intent must therefore be proved, as well as the other material facts in the indictment. The proof may be either by evidence, direct or indirect, tending to establish the fact, or by inference of law from other facts proved; for though it is a maxim of law, as well as the dictate of charity, that every person is to be presumed innocent until he is proved to be guilty, yet it is a rule equally sound that every sane person must be supposed to intend that which is the ordinary and natural consequence of his own purposed act." 3 Greenleaf, Ev. (15th ed.) § 13.

In speaking of "presumptions of law and presumptions of fact," the same author says that "presumptions of law consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry;" and then divides such "presumptions of law into two classes, namely, *conclusive* and disputable" (1 Greenleaf, Ev. [15th ed.] § 14); whereas, "presumptions of fact . . . differ from presumptions of law in this essential respect: that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever. Such, for example, is the inference of guilt drawn from the discovery of" the facts therein stated. Id. § 44. While there is some confusion of statement among the adjudications on the subject, yet it is safe to say, upon the great weight of authority, as well as reason, that every sane man is presumed to contemplate the natural and probable consequences of his own voluntary acts. Applying that principle to the instruction in question, and it may still be said, with some force, as argued by counsel, that the facts recited in the instruction merely raised a presumption or inference of fact that the accused "did so assault his wife with intent to kill her," instead of a presumption of law to that effect, as stated in the instruction. And yet it is manifest that the jury were only authorized to find such guilty intent in case they found the facts and circumstances mentioned in the instruction to be true; in other words, the presumption or inference of guilty intent was to be derived wholly and directly from the facts and circumstances of the case, as disclosed by the evidence and recited in the instruction. Under that instruction, the jury were only allowed to find the accused guilty of such intent in case they believed from the evidence beyond a reasonable doubt that the accused was of sound mind, that he

"did shoot his wife, and cut her throat, as charged in the information, and that the natural, probable, and ordinary consequences of such acts would be the death of such wife;" and the same instruction, as well as other portions of the charge, required the jurors, in order to convict, to find that the accused did the acts mentioned "with the premeditated design to effect the death of said wife." Thus, the jury necessarily found that the accused did the acts mentioned "with the premeditated design to effect the death of his wife," and also "that the natural, probable, and ordinary consequence of such acts" was the death of such wife. We must hold that there was no reversible error in giving the instruction quoted, although it was subject to criticism in the particular mentioned.

10. We perceive no error in charging the jury:

"Insanity means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or not conscious at the time of the nature of the act which he is committing; and where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will—by which is meant the governing power of his mind—has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control."

Such ruling has been expressly sanctioned by this court. *Butler v. State,* 102 Wis. 364, 366, 367, 78 N. W. 590; *Eckert v. State,* 114 Wis. 160, 163, 164, 89 N. W. 826. Nor do we think there was any error in charging the jury to the effect that we are not to infer that a man is insane from the mere fact of his committing a crime, or from the enormity of the crime, or the absence of adequate motive. Nor was there any error in charging the jury:

"Moral or emotional insanity does not exempt a person from criminal responsibility. Mere moral insanity, or temporary frenzy or passion, arising from excitement or anger, and not from any mental disease, is not an excuse for crime."

11. After defining insanity, as mentioned, the court read to the jury lengthy extracts from the opinion of Mr. Justice LYON in the *Chafin Will Case,* 32 Wis. 560–563. It is unnecessary to repeat what is there said. As there indicated, Bradley Chafin had many peculiarities, and entertained many opinions which were generally deemed absurd and extravagant, and his conduct in some respects was eccentric and foolish. That action was equitable in its nature, and this court held that the verdict in the trial court, to the effect that Bradley Chafin was insane, was "clearly contrary to the weight of the evidence." *Chafin Will Case,* 32 Wis. 569. True, such extracts from the opinion in that case were so given as illustrations of what a man might do and still be sane, but they were given to the jury by the trial court as the opinion and judgment of this court, and hence would naturally have a controlling influence with the jury. They were stated as principles to be followed by the jury. And yet the two cases are so broadly distinguishable in their facts as to make such extracts inapplicable to this case, and hence misleading to the jury. We must hold that the reading of such extracts to the jury was error.

12. Error is assigned because the court refused to give each of the four instructions requested. But they are all substantially covered by the charge. There seems to be no other question of sufficient importance to call for consideration.

*By the Court.*—For the errors mentioned, the judgment of the circuit court is reversed, and the cause is remanded for a new trial upon both of the issues. The warden of the state prison will surrender the plaintiff in error to the sheriff of Clark county, who will hold him in custody until he shall be discharged, or his custody changed by due course of law.

SIEBECKER, J., took no part.

# PYM, Appellant, vs. PYM, Respondent.

*March 25—September 8, 1903.*

***Estates of decedents: Residuary legatee as executor: Bond to pay debts: Liability of estate: Homesteads: Evidence: Declarations of deceased persons: Limitations of actions.***

1. Where a residuary legatee, who is also the executrix, gives the bond provided by sec. 3795, Stats. 1898, conditioned "to pay all the debts and legacies of the testator," the giving of such bond does not have the effect to pass to the executrix and residuary legatee the absolute title to the whole estate, terminate the administration, and limit the remedy of general creditors of testator to proceedings upon the bond against the legatee personally. *Will of Ebenezer W. Cole*, 52 Wis. 591, so far as it announces a contrary doctrine, overruled.
2. In such case, all the property, not exempt, of which the testator died seized is subject to the payment of his debts, whether the executor gives the bond required by said sec. 3795 or the bond ordinarily required by law.
3. Under sec. 2983, Stats. 1898 (providing that a debtor's homestead, not exceeding one-fourth acre, shall be exempt), and sec. 3682 (providing that if a testator makes provision by his will for the payment of his debts, then they shall be paid accordingly, but that no general direction in any will to pay the debts of the testator out of his property shall subject the homestead to the payment thereof), the provision of a will giving to testator's widow all of his real and personal estate "which should remain after the payment of" his "just debts and funeral expenses," only charges with the payment of testator's debts such real estate as is in excess of the one-fourth acre, owned and occupied by deceased and his wife as his homestead at the time of his death.
4. In an action by a testator's son against testator's widow (who as residuary legatee and executrix had given a bond to pay debts and legacies), to recover an alleged indebtedness of the decedent to plaintiff, self-serving declarations of the testator, made to his wife, are inadmissible.
5. Such declarations would be also inadmissible, even had the plaintiff opened the door for the widow to testify generally as to communications with her deceased husband.
6. In an action by a testator's son against the widow (who as residuary legatee and executrix had given bond to pay debts

and legacies), to recover money alleged to have been advanced to his father in his life time, the fact that prior to his death testator had sued plaintiff to recover back funds alleged to have been converted by plaintiff, which suit was compromised and discontinued without costs to either party, is admissible in evidence, but fails to show conclusively testator's claim relative to such funds, or that plaintiff acquiesced in such claim.

7. Where the residuary legatee and executrix gave bond to pay debts and legacies under the provisions of sec. 3795, Stats. 1898, and thereby became personally liable to pay testator's debts, a cause of action against the testator, on which suit was brought against the residuary legatee, is not barred by the statute of limitations until six years after the giving of such bond.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

This action was commenced May 15, 1900, to recover $524.16, alleged to have been loaned and advanced to the defendant's testate, William Pym, who died March 21, 1894. The complaint alleges, in effect, that William Pym became indebted to the plaintiff on an account for moneys loaned and advanced to him during his lifetime, upon his request, to the amount stated, upon the express understanding and agreement that if, for any reason, said William Pym was unable to repay the several sums so advanced, he would devise and bequeath his two lots therein described to the plaintiff as payment therefor; that the money was demanded of William Pym and the defendant, but was never repaid; that William Pym died March 21, 1894, without devising said lots to the plaintiff; that he left a will, in which he named the defendant as executrix and residuary legatee, and by the will he devised all of his property to the defendant, subject to the payment of his debts, funeral expenses, and bequests; that May 3, 1894, the defendant gave the usual statutory bond as such executrix and residuary legatee, as required by sec. 3795, Stats. 1898, and all the property of the deceased was assigned to her by the county court; that the real estate so assigned consisted of

the two lots described; that the defendant has no other property than the two lots mentioned. Wherefore the plaintiff prayed judgment for the sum stated, together with costs, and that the judgment be declared a lien upon the lots mentioned. The answer consists of admissions, denials, and counter allegations to the effect that the lots and the building thereon constituted the homestead of William Pym and the defendant, and have been actually selected and occupied and claimed by her as such ever since the will took effect May 2, 1894, and that during all of that time the defendant has resided thereon, and still resides thereon; that, if the plaintiff loaned and advanced moneys to William Pym, the same were taken out of the moneys and property which belonged to William Pym or his estate. And for a separate defense the answer alleges that the rights of the plaintiff, if any, have been barred by the statutes of limitation. At the close of the trial the court made findings of fact to the effect that the plaintiff was the son of William Pym, and the defendant was the wife of William Pym; that William Pym died, and left a will dated January 15, 1891, and which was admitted to probate May 1, 1894, as stated, in which he left $1 to the plaintiff, $1 to another son, and made the defendant sole executrix, legatee, and devisee; that the whole estate was assigned to the defendant upon her giving a bond of $100 to pay debts and legacies, which she gave; that the items of money mentioned in the complaint were paid by the plaintiff out of the moneys and property which belonged to William Pym or his estate, and made at or about the times mentioned in the complaint; that the plaintiff has not proven that he had a valid claim against William Pym at the time of his decease, or against his estate at any time. And as conclusions of law the court found, in effect, that the plaintiff's complaint must be dismissed, and that the defendant is entitled to judgment dismissing the complaint, and for her costs and expenses in the action, and ordered

judgment to be entered accordingly. From the judgment so entered the plaintiff brings this appeal.

For the appellant there was a brief by *Sheridan & Evans,* and oral argument by *Phil. Sheridan.*

For the respondent there was a brief by *Ellis, Merrill & Silverwood,* and oral argument by *T. P. Silverwood.*

CASSODAY, C. J. At the commencement of the trial the defendant objected to any evidence under the complaint, because it did not appear therefrom that the plaintiff had not a full and complete remedy by proceedings in the county court, and hence that a court of equity should decline to take jurisdiction. This objection was manifestly based upon the rulings of this court in *Meyer v. Garthwaite,* 92 Wis. 571, 573, 576, 66 N. W. 704; *Burnham v. Norton,* 100 Wis. 8, 13, 75 N. W. 304; *Hill v. True,* 104 Wis. 294, 301, 80 N. W. 462; *Ludington v. Patton,* 111 Wis. 208, 249, 86 N. W. 571. The complaint alleges, and the proofs show, that the defendant, as executrix and residuary legatee, had given the bond required by sec. 3795, Stats. 1898, conditioned "to pay all the debts and legacies of the testator." This being so, the trial court held, in pursuance of a decision of this court, that the effect of giving such bond was to pass to the defendant "the absolute title to the whole estate, and to terminate the administration," and that "claims against the estate became, by the execution of the bond, claims against such sole legatee, and the remedy of general creditors of the estate was thereafter upon the bond or against the legatee, and not against the estate." *Will of Ebenezer W. Cole,* 52 Wis. 591, 592, 9 N. W. 664. And see *Meyer v. Garthwaite,* 92 Wis. 575, 66 N. W. 704. In the first of these cases it is said that such "is the doctrine of the Massachusetts cases" arising under a statute like ours; citing *Thompson v. Brown,* 16 Mass. 172; *Clarke v. Tufts,* 5 Pick. 337. Neither of those cases goes to

the extent stated. Thus, in a recent case in that state it is held:

"It is no defense to an action under the" statute "against an administrator *de bonis non* with the will annexed that the original executor, who was also the residuary legatee, gave a bond to pay debts and legacies." *Collins v. Collins,* 140 Mass. 502, 5 N. E. 632.

It is there said by the court:

"It is true that the bond made the executrix personally liable upon it to the extent of its penalty, but that is not sufficient to exonerate the estate, unless the statutes provide that it shall have that effect. We find no such provision. . . . The purpose of the section was to confirm the doctrine of *Gore v. Brazier,* 3 Mass. 523, 543, to the effect that 'the lien on the testator's estate, real or personal, . . . remains in full force, and the benefit to be derived by a creditor or legatee from the bond is merely cumulative.'" Page 505, 140 Mass., and page 633, 5 N. E.

And then, after citing *Thompson v. Brown* and *Clarke v. Tufts, supra,* to the exception therein mentioned, it is said:

"But this exception is shown to be consistent with the principle quoted from *Gore v. Brazier* by the fact that it also is adopted by the statute. And that principle is so fully recognized by the later decisions that it is only necessary to cite them." Citing numerous cases. Page 506, 140 Mass., and page 633, 5 N. E. To the same effect: *Jenkins v. Wood,* 144 Mass. 238, 10 N. E. 818.

So it has been held in Michigan:

"The statutes declaring that all of a testator's property shall be chargeable with the payment of all of his debts create an equitable lien in favor of creditors, which is not destroyed by the execution of the statutory bond by a residuary legatee, which becomes an additional security for such payment." *Lafferty v. People's S. Bank,* 76 Mich. 35, 43 N. W. 34. See, also, *Blackmore v. Perkins,* 95 Mich. 446, 54 N. W. 945.

In a later case in that state it has been held, in effect, that the "right of disposition of the property" of the estate by an executor and residuary legatee in the will, who has given

such bond, "is subject to the authority of the probate court to compel the application of the property to the payment, ratably, of the decedent's debts, in case the executor fails to provide for them from other sources. Therefore it is improper, where there is a deficiency of assets, for such an executor to mortgage" or dispose of the property "in such a manner as to work preferences among the creditors." *In re Vedder's Estate,* 122 Mich. 439, 81 N. W. 356. The defendant in the case at bar, having given the bond, as required by sec. 3795, Stats. 1898, was thereby relieved from making or returning an inventory of the estate; but this court has held, in harmony with the cases cited, "that the mere ordering, receiving and approving the bond" did not *ipso facto* vest "the title to the whole estate, both real and personal, in the executrix absolutely and irrevocably." *Jones v. Roberts,* 84 Wis. 465, 470, 54 N. W. 917, 918.

"It is only when, by the terms of the will, the executor is such sole or residuary legatee, and the same is judicially determined upon due notice and opportunity for hearing, that such transfer becomes complete in law." Id.

Upon the death of a person his property not exempt at once becomes "chargeable . . . with the payment of all his . . . debts," whether he dies testate or intestate. Secs. 2270, 2277, 2281, Stats. 1898. *Union Nat. Bank v. Hicks,* 67 Wis. 191, 30 N. W. 235. The statute also expressly provides that "all the estate of the testator or intestate, real and personal, except the homestead of the deceased, and" certain personal property named in the statute, "shall be liable to be disposed of for the payment of his debts and the expenses of administering his estate." Sec. 3862, Stats. 1898. Thus, it appears from the statutes, as well as from the decisions in other states under similar statutes, that all property, not exempt, of which a testator dies seised is subject to the payment of his debts, whether the sole executor and residuary legatee gives the bond required by sec. 3795 or the bond re-

quired by the previous section. See, also, sec. 3940, Stats. 1898. *Jones v. Roberts,* 84 Wis. 471, 54 N. W. 917. In so far as the *Cole Case* held that the giving of the bond required by sec. 3795 had the effect "to pass to the executrix and sole legatee the absolute title to the whole estate, and to terminate the administration," and limit "the remedy of general creditors" to proceedings "upon the bond or against the legatee" personally, the same must be overruled.

2. The complaint alleges that by the will the testator devised to the defendant lots 71 and 72, Original Plat of Ft. Howard, "subject to the payment of debts, funeral expenses, and bequests" therein mentioned; and prays that the plaintiff's claim of $524.16 be adjudged a lien thereon. The answer alleges, in effect, that the whole of said lots, with the dwelling house on lot No. 71, and its appurtenances, except a strip of land on the northerly side of lot No. 72 of the width of 26.23 feet—being the excess over one-fourth of an acre in said lots, constitutes the homestead on which the testator resided at the time of making the will, and has actually been selected, occupied, and claimed by the defendant as her homestead ever since the will took effect, and that during all that time the defendant had resided thereon in such dwelling house, and still resides thereon. The will gave and devised to the defendant all his real and personal property which he should own at the time of his death and which should "remain after payment of" his "just debts and funeral expenses." A section of the statute cited provides, in effect, that, "if a testator shall make provision by his will . . . for the payment of his debts," etc., then "they shall be paid accordingly," but that "no general direction in any will to pay the debts of the testator out of his property shall subject the homestead to the payment thereof." Sec. 3862, Stats. 1898. There can be no question but that the quarter of an acre constituting the homestead is exempt. Sec. 2983, Id. But it is equally certain that the strip of land on the northerly side of

lot 72, mentioned in the answer, was, by the will, charged with the payment of his debts. *Merton v. O'Brien,* 117 Wis. 437, 94 N. W. 340, 341; *Evans v. Foster,* 80 Wis. 509, 50 N. W. 410. The case is broadly distinguishable in its facts from *In re Will of Madden,* 104 Wis. 61, 80 N. W. 100. Assuming that the plaintiff has a just claim against the estate of the testator, then we perceive no good reason why, upon the principle of the cases cited at the commencement of this opinion, the circuit court could not properly take jurisdiction and enforce payment of such claim out of the strip of land mentioned. *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704; *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304; *Hill v. True,* 104 Wis. 294, 80 N. W. 462; and *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571.

3. The $524.16 claimed by the plaintiff is alleged to be on account of moneys loaned and advanced to the testator, and in his behalf, and upon his request, as per statement made a part of the complaint, and under the express agreement therein stated. The statement of the moneys so loaned and advanced commences in March, 1888, and terminates in December, 1894. The answer alleges that, if any of the items mentioned in that statement were paid or incurred by the plaintiff, the same were paid out of moneys and property belonging to the testator or his estate. The court found that such payments were made by the plaintiff at or about the times mentioned in such statement, but that the plaintiff made such payments out of the moneys and property which belonged to the testator or his estate. The vital question litigated was whether the moneys so paid out were the property of the plaintiff or the property of the testator or his estate. A large portion of the evidence in support of such finding consists of the testimony of the defendant, taken against objection, to the effect that the *testator told her* that he had $1,100 when his wife died, which the plaintiff took; that the plaintiff gave back to the testator $300 of that sum, leaving

$800 still in the hands of the plaintiff; that the plaintiff took the money in the fall before he was married, and put it into the Kellogg Bank in his own name; that the testator had always told her that the plaintiff had, without his consent, taken $700 or $800 from his possession in a place under the house where he kept it; that he always informed her and claimed that the plaintiff was owing him $700 or $800; that the plaintiff would not give the testator the privilege of using his own money. Such declarations of the testator were clearly inadmissible. The defendant derives her title to the estate from the testator. It is substantially the same as though the suit was against the testator himself. If the suit had been brought against him in his lifetime, no one would claim that he would have had the right to prove such self-serving declarations to his own wife. The mere fact that he has died since making the alleged declarations, and that his estate has passed to the defendant, does not make them admissible in her favor. Thus it is stated by a recent text-writer:

"The conduct, admissions, and declarations of a party in his own interest are no more competent as evidence for his estate after his death than for himself while living; and, if such statements were not made in the presence of the adverse party, they are inadmissible in a suit against the estate." 1 Jones, Ev., § 236.

So it has been held by this court:

"In an action by an administrator to prevent the enforcement of a judgment against his intestate, evidence of declarations of the debtor in his lifetime as to payment of the judgment is inadmissible." *Jilsum v. Stebbins,* 41 Wis. 235. See, also, *Carlyle v. Plumer,* 11 Wis. 96; *Ward v. Ward,* 37 Mich. 253; *Doan v. Dow,* 8 Ind. App. 324, 35 N. E. 709.

But it is said that the plaintiff himself opened the door for the admission of such testimony. We fail to find that he gave any evidence of such declaration or communication from the testator to his wife. An exception to the rule stated is

where the declarations made are against the interest of the party making them. 1 Greenl. Ev. §§ 147, 149; 1 Jones, Ev. §§ 241, 243; *Lehman v. Sherger,* 68 Wis. 145, 31 N. W. 733; *Pritchard v. Pritchard,* 69 Wis. 373, 34 N. W. 506. The giving of evidence of such declarations by the testator did not authorize the admission of such self-serving declarations.

4. Exception is taken because the defendant was allowed to prove, in effect, that April 19, 1890, the plaintiff was sued by his father, and the Kellogg National Bank garnished to recover back $750 alleged to have been paid to and received by the plaintiff herein May 29, 1888, and that April 23, 1890, the plaintiff herein paid to his father $200, and that thereupon the suit and garnishee action were both discontinued, without costs to either party. The son had the right to compromise and settle that suit in the manner stated, even if he believed the claim to be entirely unfounded. The fact that he did so was admissible in evidence. But such settlement was not an admission on the part of the son that the facts alleged in his father's verified complaint were true. The extent of the son's admission was necessarily measured by what he said and did under the circumstances, and not by the complaint made by his father against him. And yet the trial court states, in effect, that such record evidence "conclusively established" not only contradicted "much of the parol testimony, but shows conclusively William Pym's claim relative to said funds, *and the plaintiff's acquiescence in such claim.*" No such effect should be given to the compromise of that suit.

5. The defendant contends that the plaintiff's cause of action, if any, is barred by the six-year statutes of limitation. It is true that the action was not commenced until more than six years after the testator's death. The contention is that the statutes began to run on each loan and advance immediately when made. Certainly such loans and advances did not constitute a mutual account. *Butler v. Kirby,* 53 Wis. 188,

10 N. W. 373; *Fitzpatrick v. Phelan's Estate,* 58 Wis. 250, 16 N. W. 606; *Dunn v. Fleming's Estate,* 73 Wis. 545, 41 N. W. 707. If the cause of action alleged consisted only in such loans and advances, then there would be force in the defendant's contention. But the cause of action alleged is the liability of the defendant as sole executrix and legatee under the will and the statutes by reason of her acceptance of the same and giving the bond required by sec. 3795, Stats. 1898. The action is not on the bond. The bond is mentioned in the complaint merely to show the liability of the defendant and the land therein described. When did such cause of action accrue? The testator died March 21, 1894. The will was admitted to probate May 2, 1894. The bond was given by the defendant May 3, 1894. The record shows that the summons was served May 1, 1900, and that the defendant's attorneys served notice of retainer on the plaintiff's attorneys May 2, 1900. As virtually held in *Merton v. O'Brien,* 117 Wis. 437, 94 N. W. 341, the defendant took the land described as her own, subject to the payment of debts and expenses charged thereon as stated. By accepting the devise and taking possession thereof under the will, she became personally liable to pay such charges thereon as they became due and payable. No cause of action accrued against the defendant until after the death of the testator. Such death, and the provisions of the statutes cited, and the will, and the probate thereof, and the action of the defendant thereunder, gave to the plaintiff, if he was a creditor of the testator, a cause of action against the defendant which he did not previously possess. We must hold that the cause of action alleged did not accrue more than six years prior to the commencement of this action. By reason of the findings and judgment having been based upon incompetent evidence, as mentioned, there must be further trial and findings as to whether the moneys alleged to have been paid by the plaintiff were in fact paid by him out of his own money or property or out of money or property belong-

ing at the time to the testator or his estate. This is in harmony with the practice in such cases. *Brown v. Griswold,* 109 Wis. 275, 280, 85 N. W. 363; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 92 N. W. 246, 259; *Kinn v. First Nat. Bank, ante,* p. 537, 95 N. W. 969; and *Fischbeck v. Mielenz,* 119 Wis. 27, 96 N. W. 426.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded for further trial and findings as mentioned in this opinion, and for further proceedings according to law.

SIEBECKER, J., took no part.

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UPTHEGROVE, by guardian *ad litem,* Respondent, vs. JONES & ADAMS COAL COMPANY, Appellant.

*March 25—September 8, 1903.*

***Master and servant: Minors: Personal injuries: Negligence: Knowledge of danger: Assumption of risk: Contributory negligence.***

1. Where a minor servant, under the circumstances of his employment, ought to have known and comprehended an apparent danger, he assumes the risks incident to his employment.
2. In an action by a minor servant for personal injuries received in the course of his employment, the evidence, stated by the court, examined and *held* to show such failure to exercise ordinary care as to constitute contributory negligence.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action was commenced May 31, 1902, to recover damages for personal injuries sustained by the plaintiff July 20, 1900, while in the employ of the defendant as fireman on two small engines used in connection with derricks in hoisting coal from the boats to the defendant's coal dock in Ashland.

Issue being joined and trial had, the jury, at the close of the trial, returned a special verdict to the effect (3) that the plaintiff was injured while engaged in operating the injector and cold-air valve on the defendant's derrick, (4) under the defendant's direction, (5) at a place unnecessarily dangerous to the defendant's employees; (6) that the uncovered gearing in which the plaintiff was injured was so located as to be dangerous to such employees while in the performance of their duties; (7) that the plaintiff, in the exercise of ordinary care, ought not to have known that the cogwheels meshed downward at the time of the injury; (8) that the plaintiff had not sufficient experience in the business in which he was engaged to comprehend the dangers incident to such work or employment; (9) that he had not been sufficiently instructed or cautioned by the defendant to enable him to comprehend and understand such danger before the accident; (10) that the plaintiff was in the exercise of such care at the time of the accident as an ordinarily prudent and careful person of the same age, understanding, and experience would have used; (11) that the defendant was guilty of negligence in operating its machinery in its then condition at the place where the plaintiff was injured; (12) that such negligence was the proximate cause of such injury; (13) that they assessed the plaintiff's damages at $3,600. From the judgment entered upon such verdict for the amount stated and costs, the defendant brings this appeal.

The facts are practically undisputed, and to the effect that the plaintiff was eighteen and one-half years of age at the time he was injured, and had just finished his junior year in the high school; that he was five feet seven inches in height, and weighed about 145 pounds at the time of the trial; that he had been a fireman off and on in a steam-heating plant for several years; that he had worked for the defendant forty days the previous season at the same kind of work that he was doing when injured—firing engines used in operating coal

derricks—and had worked for the defendant for twenty days immediately before he was injured; that the hoisting machinery used in connection with each of the derricks was in a little room twelve feet long and eight feet wide, with a roof ten feet high at the back end and fourteen feet high at the front end, and that the front end was entirely open and the other three sides inclosed without windows; that in this room there were several gears and considerable other machinery; the gearing in which the plaintiff's hand was caught drove all the machinery in that derrick; that when a bucket of coal was hoisted to the proper height the derrick swung around, the little house and all of the machinery going with it, and when the coal was dumped the whole thing swung back; that it took about thirty seconds to swing the derrick half way around in this manner; that a person on the derrick, not accustomed to the motion, would have to hang on to something to preserve his balance; that a derrick hoists twenty-five or thirty buckets an hour, and the engine and hoisting machinery stop and start from twenty to one hundred and eighty times an hour; that the plaintiff was injured about twenty minutes after five o'clock in the afternoon of July 20, 1900, while operating a cold-air valve with a loose wheel on a pin, which wheel was about six inches above beveled-geared cogs meshing downward; that the diameter of the cogwheels was twelve inches and the diameter of the little wheel on the valve was three inches; that such machinery was located in a derrick used for hoisting coal from boats to the dock; that there were four such derricks, and the plaintiff was hurt on one of them; that these derricks were about ten feet above the dock, situated on trestles with four wheels on each derrick, which ran on tracks about fifteen feet apart; that there was a platform about two and one half feet above this beveled gear, and a chair on the top of this platform, in which the engineer sat; that on the right-hand side of this cold-air valve, facing the opening in the building, was located a big drum, on which

the wire cable coiled; that on the left-hand side was located the wooden platform, laid over with boards, upon which was a chair where the engineer sat; that the cog gearing was about eight feet back from the open end of the building; that the plaintiff's duties were to keep up fire, keep water in the boiler, sweep out and oil the machinery; that he had to do such work in two of the derricks, including the one on which he was injured; that the boxes and shafts he oiled every morning, some times at noon; that he handed the oil can to the engineer, and he oiled the cogs or gearing from where he sat; that the engineer told the plaintiff to put some grease on this gear with a stick, and he did, but did not put on enough, and so the engineer took the stick and put on more; that the place where the plaintiff oiled the shafts was from four to five feet from this cold-air valve; that while the plaintiff was putting on the grease the machinery was stationary; that he only did that once; that he used the injectors at the boiler twenty or thirty times a day; that he only used the cold-air valve three or four times prior to the time he was hurt; that the cold-air valve was only used when the injectors would not work; that the wheel on this valve was loose; that in opening the cold-air valve it was necessary to take the wheel off the nail where it hung, and put it on the pin, and then open the valve a little, and, just as soon as the air started sucking, shut off the cold-air valve again, and then, if it did not suck so the water could be heard running, to shut off the cold-air valve again with a quick jerk; that such was the way the engineer showed the plaintiff how to work the valve; that while working the cold-air valve it was necessary to watch the steam gauge on the boiler, so that the noise of the water would be heard, and it would be known to be going all right; that the plaintiff knew where to oil the machinery without being instructed; that he swept occasionally the year before; that the plaintiff asked for this job in the season of 1900, and received a man's wages for his work; that he knew of the ex-

istence and of the exact location of this gearing some time before he was caught in it, having greased and assisted in greasing and oiling it before that time; that he had seen the defendant's employees take the gearing apart; that from the place where the plaintiff stood when he was injured the gearing could be plainly seen; that he understood that, if he got his hand in the gearing, it would be crushed; that he knew that, if he got his hand in this particular gearing, it would be crushed; that he knew that, if he got his hand between two cog wheels, it would be crushed; that he knew that the little wheel which slipped off the spindle and let his hand drop into the gearing was not fastened to the spindle; that he himself had chiseled out the eye of another wheel to make it fit on the spindle, and it was the slipping of this wheel from the spindle that caused the accident.

The plaintiff testified to the manner in which he was injured to the effect that at the time he was injured he was trying to make the cold-air valve work; that he had been down on the track below the derrick, and got up in the derrick, and thought it was about time to put some water in the boiler, and so he looked at the gauge and saw it needed water, and then he tried to run it through the injector, and the injector was bucking; that he did not know what was the matter with it, and so he went over and tried to turn on the cold-air valve; that he left the two valves that were at the boiler, and went round on the left-hand side of the engine, and walked round in front and stepped in under the big arm that goes into the derrick; that there was an iron rod that ran out about three feet from the platform; that he walked in front of the engineer, and stepped over that rod into the little place about a foot and a half square, situated about six inches from the cogwheels into which the cogs of the drum mesh; that when he reached that place he took the little wheel off the nail and put it on to the pin, and then turned it once, and it started sucking, and then he shut it off, and the injector then

would not work and he kept on turning it; that there was something the matter with it, it would not work, and he kept on turning it, and finally the wheel came off the pin and his hand dropped down and went into the gearing and he was injured; that the machinery was stationary when he went in there; that in going in he passed right in front of the engineer, within a foot of him; that he did not know when the machinery started up; that he did not know that the machinery had started up until he was injured; that he did not have any previous knowledge as to which way the cog wheels meshed; that he did not understand that there was any danger in operating that cold-air valve in the way it was operated; that he did not realize any danger himself, and the engineer had never cautioned or spoken to him about it; no one had cautioned him about any danger; that the gearing on which the plaintiff was injured was uncovered, and could have been covered so as not to interfere with the working of the machine.

For the appellant there was a brief by *Lamoreux & Shea,* and oral argument by *W. F. Shea.*

*A. W. Sanborn,* for the respondent.

CASSODAY, C. J. Four errors are assigned upon which we are asked to reverse the judgment in this case. The one particularly relied upon is the refusal of the court to grant a nonsuit or direct a verdict in favor of the defendant. This is based upon the ground that it appears from the undisputed evidence that the plaintiff assumed the risk and was guilty of contributory negligence. Counsel for the plaintiff insists that that is the only debatable question presented on this appeal. He, moreover, concedes that, if that question is decided adversely to the plaintiff, then that the judgment should be reversed, with directions to dismiss the complaint. The facts upon which the respective parties base their contentions are presented in the foregoing statement. They need

not be here repeated. The age and experience of the plaintiff with the machinery of that kind was such as not to require further instruction than was in fact given as to the danger of getting his hand into the cogwheels while running. In that respect he must be held to the same responsibility as a man of mature years. He testified to the effect that he knew, if he got his hand in this particular gearing, it would be crushed; that, if he got his hand between the two cogwheels, it would be crushed; that he understood that, if he got his hand in the gearing, it would be crushed; that he had seen the defendant's employees take the gearing apart; that he knew of the existence and of the exact location of this gearing for some time before he was caught in it; that from the place where he stood when he was hurt such gearing could be plainly seen; that he was injured while operating the cold-air valve with a loose wheel on a pin which wheel was three inches in diameter and about six inches above the beveled-geared cogs meshing downward; that the cold-air valve was only used when the injectors would not work; that he had only used it three or four times prior to the injury; that the wheel on this valve was loose, and it was necessary to take it off the nail where it hung and put it onto the pin, and then turn it back and forth; that the engineer had showed him how to work the valve. He necessarily knew that the little wheel was not fastened to the spindle, and was liable to slip off; and he testified that when the wheel came off the pin his hand dropped down and went into the gearing, and he was injured. True, the plaintiff testified that he did not know that the cogwheels meshed downward, nor just when the cogwheels started. But they were liable to start at any time.

"This court has repeatedly held that the true test as to whether a minor has assumed the ordinary risks of his employment, or is guilty of contributory negligence, is not whether he in fact knew and comprehended the danger, but whether, under the circumstances, he ought to have known and comprehended such danger. *Luebke v. Berlin M. Works,*

88 Wis. 442, 60 N. W. 711; *Craven v. Smith,* 89 Wis. 126, 61 N. W. 317; *Casey v. C., St. P., M. & O. R. Co.* 90 Wis. 113, 62 N. W. 624; *Herold v. Pfister,* 92 Wis. 417, 66 N. W. 355; *Klatt v. N. C. Foster L. Co.* 92 Wis. 622, 627, 66 N. W. 791; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, 71 N. W. 1034; *Larson v. Knapp, Stout & Co. Co.* 98 Wis. 178, 73 N. W. 992.

It has also been repeatedly held:

"Where it appears from the undisputed evidence that the defect or danger is open and obvious, and such as, under the circumstances, ought to have been known and comprehended by the plaintiff, then he will be held to have assumed the risk as a matter of law." *Helmke v. Thilmany,* 107 Wis. 216, 224, 83 N. W. 360, 363. See, also, *Sladky v. Marinette L. Co.* 107 Wis. 250, 261, 263, 83 N. W. 514; *Kreider v. Wisconsin River P. & P. Co.* 110 Wis. 645, 659, 86 N. W. 662; *Muenchow v. Zschetzsche & Son Co.* 113 Wis. 8, 88 N. W. 909.

After careful consideration we are forced to the conclusion that the admitted facts bring the case within the rule stated. The little wheel was small, but the plaintiff necessarily knew that, unless he resisted the tendency, its weight was sufficient to bear his hand downward while putting it on or taking it off the pin. His failure to exercise ordinary care in that respect was contributory negligence. The view we have thus taken of the case makes it unnecessary to consider other questions presented in the brief of counsel for the defendant. We must hold that the answers to the seventh, eighth, ninth, and tenth questions are contrary to the undisputed evidence, and that the trial court should have granted the motion of the defendant to change the answers to the first three of those questions from the negative to the affirmative, and to change the answer of the tenth question from the affirmative to the negative, and, when so changed, to render judgment thereon in favor of the defendant and against the plaintiff, dismissing the complaint, and for costs. This is in accordance with the repeated rulings of this court. *Stafford v. Chippewa Valley*

*E. R. Co.* 110 Wis. 331, 362, 85 N. W. 1036, and cases there cited; *Zahn v. M. & S. R. Co.* 114 Wis. 38, 43, 89 N. W. 889; and cases there cited.

*By the Court.*—The judgment of the circuit court is reversed, and the cause is remanded, with directions to change the verdict as indicated, and, when so changed, enter judgment thereon in favor of the defendant and against the plaintiff, as mentioned.

SIEBECKER, J., took no part.

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